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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

STATE OF ARKANSAS

Petitioner

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Congress' statutory designation of production credit associations as "federal instrumentalities" entitle them to constitutional immunity from state taxation under the doctrine of intergovernmental tax immunity going beyond the express tax immunity afforded them by 12 U.S.C. § 2077.

LIST OF PARTIES

The parties to this proceeding are the same as the parties to the proceeding below. The petitioner is the State of Arkansas, through the Department of Finance and Administration. The respondents are four production credit associations chartered by the Farm Credit Administration, including Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. The decision of the Supreme Court of Arkansas that production credit associations are constitutionally immune from state taxation as "federal instrumentalities" calls into question the decisions of other state courts that production credit associations are subject to state taxation after the government ceases to own stock in the associations. 11

II. The Arkansas Supreme Court's analysis of whether the statutory designation of a production credit association as a federal instrumentality is, in and of itself, sufficient to exempt a PCA from state taxation failed to properly apply the reasoning employed by this Court in *Arkansas v. Farm Credit Services*,

520 U.S. 821 (1997), concerning the significance of the statutory designation of a PCA as a federal instrumentality. 18

CONCLUSION 22

APPENDIX (Opinion and Judgment of the Supreme Court of Arkansas and Order of Chancery Court of Pulaski County, Arkansas) A1

TABLE OF AUTHORITIES

Cases: **Page**

Arkansas v. Farm Credit Services, 520 U.S. 821 (1997). 11,18,19,21

Baker Production Credit Ass'n v. State Tax Comm'n, 421 P.2d 984 (Ore. 1966) 13

Brown v. Gardner, 513 U.S. 115 (1994) 16

Columbus Production Credit Ass'n v. Bowers, 173 Ohio St. 97, 180 N.E.2d 1, cert. denied, 371 U.S. 826 (1962). 13

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 17

Davis v. Michigan, 489 U.S. 803 (1989) 15,21

Department of Employment v. United States, 385 U.S. 355 (1966) 20

Farmers Production Credit Association of South Burlington v. Vermont, 481 A.2d 18 (Vt. 1984) 13

North Dakota v. United States, 495 U.S. 423 (1990) 17

United States v. City of Detroit, 355 U.S. 466 (1958) ... 17

Woodland Production Credit Association v. Franchise Tax Bd., 225 Cal. App.2d 293, 37 Cal. Rptr. 231 (1964) 13

Statutes:

Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633 14

Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998 14

Farm Credit Act of 1933, ch. 98, 48 Stat. 257: § 63, 48 Stat. 267 12

Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583
§ 2.17, 85 Stat. 602 12
§ 4.0, 85 Stat. 609 12

Farm Credit Act of 1971, 12 U.S.C. 2001 *et seq.*
12 U.S.C. § 2023 15,16
12 U.S.C. § 2071 (a) 7
12 U.S.C. § 2077 10,11,12,14,15,16,17,19
12 U.S.C. § 2098 14,15
12 U.S.C. § 2071 (b)(7) 7
12 U.S.C. § 2134 15

Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678
§ 101, 99 Stat. 1678 13
§ 205, 99 Stat. 1705 14

Miscellaneous:

H. R. Rep. No. 425, 99th Cong., 1st Sess. (1985) 13,14

H. R. Rep. No. 593, 92d Cong. 1st Sess. (1971) 14

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioner State of Arkansas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas, entered in the above-entitled proceeding on July 1, 1999.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 338 Ark. 322 (1999) and is reprinted in its entirety at Appendix A hereto. The Order of the Chancery Court of Pulaski County, Arkansas, First Division, is unreported and is reprinted in its entirety at Appendix B hereto.

JURISDICTION

The respondents brought this suit in the Chancery Court of Pulaski County, Arkansas, First Division claiming their exemption from state taxation as "federal instrumentalities" under the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States. On July 1, 1998, the chancery court granted the respondents' motion for summary judgment. (P. App. B1-3).

On petitioner's appeal, the Supreme Court of Arkansas affirmed the decision of the chancery court holding that respondents are exempt from state taxation as federal instrumentalities and entered a judgment awarding respondents a refund of state taxes which respondents claimed were paid in error. The Opinion of the Supreme Court of Arkansas was delivered on July 1, 1999 (P. App. A1-6).

This petition is filed within the time allowed by law. The jurisdiction of this Court to review the judgment of the Supreme Court of Arkansas is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ..

STATUTORY PROVISIONS INVOLVED

[Pertinent text is set forth verbatim in Appendix C as provided in Rule 14.1(f) of the Rules of the Supreme Court.]

12 U.S.C. § 2071
12 U.S.C. § 2077

STATEMENT OF THE CASE

1. The respondents are four Arkansas Production Credit Associations chartered by the Farm Credit Administration as provided by the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*). Production credit associations (PCAs) are entities of the Farm Credit System, a government sponsored enterprise created by Congress in 1916 to provide agricultural credit to American farmers. The Federal Farm Loan Act, Pub. L. No. 64-158, 39 Stat. 360 (1916) established twelve district Federal land banks to make long-term loans to farmers through Federal land bank associations.

The Farm Credit Act of 1933, Pub. L. No. 73-98, 48 Stat. 257 (1933) established the Farm Credit Administration, an independent federal agency with responsibility to oversee the banks and associations comprising the System. The 1933 Act also established Production Credit Associations to provide short term credit to farmers and ranchers through loans from Federal Intermediate credit banks, Banks for Cooperatives to make loans and provide credit services to agricultural cooperatives, the Central Bank for Cooperatives, and Production Credit Corporations. Congress established two classes of PCA stock, one to be owned by the United States through the Production Credit Corporations, and the

second to be owned by the farmer borrowers. Farm Credit Act of 1933, ch. 98, § 23, 48 Stat. 260 (1933).

Congress designated PCAs, like the other entities in the Farm Credit System, as "instrumentalities of the United States" in the 1933 Act. Farm Credit Act of 1933, ch. 98, § 63, 48 Stat. 267 (1933). The same section of the Act specifically exempted their notes, debentures, bonds, and other obligations from all federal, state, Territorial, and local taxation, except surtaxes, estate, inheritance, and gift taxes. The section also exempted the association itself, its property, its franchises, capital, reserves, surplus and other funds, and its income from all taxation, except that the real and tangible personal property of the associations was subject to tax to the same extent as other similar property. Although the exemption for the obligations was unconditional, the exemption for the association, its property, and its income applied only so long as the Production Credit Corporation owned stock in the association. *Id.*

In 1971, Congress amended the Farm Credit Act, rewriting most of the statutory authority for the Farm Credit System to "modernize and streamline" the System. H. R. Rep. No. 593, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 2091, 2092. Although by 1971 the government no longer owned any PCA stock, *Id.* at 2098, Congress provided that the Governor of the Farm Credit Administration could purchase stock in the various System entities, including PCAs, during financial emergencies to assist the associations to meet their borrowers" credit needs. Pub. L. No. 92-181, § 4.0, 85 Stat. 609 (1971). The Act provided for each PCA to "continue as a Federally chartered instrumentality of the United States." Pub. L. No. 92-181, § 2.10, 85 Stat. 597 (1971). Congress preserved both exemptions from taxation for PCAs. The PCA taxation statute, as amended, read:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other such obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.*

Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971) (emphasis added) (current version at 12 U.S.C. § 2077).

In 1985, in response to the crisis in the agricultural economy, Congress enacted the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678 (1985), to reorganize and strengthen the Farm Credit Administration by removing it from day-to-day participation and making it an "arm's-length" regulator. H. R. Rep. No. 425, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587,

2589. As a part of the reorganization, Congress repealed the Governor's authority to invest directly in production credit associations and created the Farm Credit System Capital Corporation to provide financial and technical assistance to System institutions. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 2601-2602.

Section 205 of the Act included "numerous technical and conforming amendments" to reflect "changes in the basic powers, duties and authorities of the Farm Credit Administration" and to "conform specific sections of the Act to the change made by . . . the elimination of the authority to make separate investments in individual institutions." H. R. Rep. No. 425, *supra*, at 2615. Among the technical and conforming amendments was an amendment to the PCA taxation section "striking out the last two sentences of section 2.17," italicized above, that exempted the association, its property, its funds, and its income from taxation so long as the government owned PCA stock. Pub. L. No. 99-205, § 205, 99 Stat. 1705 (1971).

Presently, the taxation of production credit associations is addressed at 12 U.S.C. § 2077,[1] as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as

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[1] The present language of 12 U.S.C. § 2077 is substantially the same as that of then Section 2098 following the 1985 amendment. The Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633, redesignated Section 2098 as Section 2077 without any change to the text. The Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998, amended Section 2077 by inserting a comma after "interest" and by adding "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority."

> to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. § 2077 (1989).

In addition to 12 U.S.C. § 2077, production credit associations are designated as federal instrumentalities in 12 U.S.C. 2071, as follows:

> Each production credit association shall continue as a Federally chartered instrumentality of the United States.

12 U.S.C. § 2071(a).

> On approval of the proposed articles by the Farm Credit Administration, and on the issuance of a charter, the association shall become as of such date a federally chartered body corporate and an instrumentality of the United States.

12 U.S.C. § 2071(b)(7).

2. In 1994 the respondents filed suit against the State of Arkansas in both federal and state court claiming that they were exempt not only from taxes expressly designated in 12 U.S.C. § 2077 (tax imposed on their obligations), but also from Arkansas state sales and income taxes. Respondents requested a declaratory judgment in the United States District Court for the Eastern District of Arkansas that they were exempt from state taxation as "federal instrumentalities" under the Supremacy Clause of the Constitution of the United

States and the doctrine of intergovernmental tax immunity and an injunction against the collection of state taxes by Arkansas. In the Chancery Court of Pulaski County, Arkansas, respondents requested a refund of the taxes they alleged were paid in error as entities exempt from state taxation, based upon the same claim of exemption alleged in district court.

The district court granted respondents' motion for summary judgment holding that PCAs are immune from state taxation as federal instrumentalities and that Congress has not expressly waived that immunity. On appeal, a divided panel of the Court of Appeals for the Eighth Circuit affirmed. The State filed its petition for a writ of certiorari in this Court. At the Court's request, the Solicitor General of the United States filed a brief expressing the views of the United States that the Court should consider granting certiorari to determine whether the Tax Injunction Act permits production credit associations as "federal instrumentalities" to challenge the imposition of state taxes in federal court in the absence of the United States as a co-plaintiff and that the decision of the court of appeals that production credit associations are immune from state taxation calls into question the validity of state court decisions holding that production credit associations in which the federal government holds no ownership interest are subject to state tax.

The Court granted the petition for certiorari in January 1997. In June 1997 the Court issued its opinion in *State of Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997), holding that PCAs are subject to the bar of the Tax Injunction Act (28 U.S.C. § 1341), unless the United States participates on their behalf, and dismissing the federal court action without reaching the merits issue of whether production credit associations are immune from state taxation as federal instrumentalities.

The Arkansas chancery court stayed the proceedings in the refund suit pending the outcome in this Court. Both parties moved for summary judgment when this Court decided *Farm Credit Services*. The chancery court granted respondents' motion for summary judgment, holding that federal instrumentalities are immune from state taxation unless Congress waives that immunity, that PCAs are federal instrumentalities, that Congress did not expressly waive the immunity for production credit associations, and that the PCAs' status as federal instrumentalities renders them immune from state taxation. (P. App. B1-3).

On appeal, the Arkansas Supreme Court affirmed the chancery court's decision that PCAs are immune from state taxation and awarded refunds of tax paid during the statutory refund period. The court held that PCAs are designated as federal instrumentalities by statute from which designation arises an implied immunity from state taxation, that Congress must expressly waive the exemption in order to subject PCAs to state taxation, that the present version of 12 U.S.C. § 2077 does not contain an express waiver of constitutional immunity from state taxation, and that without such a waiver PCAs are exempt from state tax. (P. App. A1-6).

REASONS FOR ALLOWANCE OF THE WRIT

THE SUPREME COURT OF ARKANSAS FAILED TO PROPERLY APPLY THE REASONING EMPLOYED BY THIS COURT IN *ARKANSAS V. FARM CREDIT SERVICES* CONCERNING THE SIGNIFICANCE OF THE STATUTORY DESIGNATION OF A PRODUCTION CREDIT ASSOCIATION AS A FEDERAL INSTRUMENTALITY, RESULTING IN A DECISION THAT PRODUCTION CREDIT ASSOCIATIONS ARE CONSTITUTIONALLY IMMUNE FROM STATE TAXATION AS FEDERAL INSTRUMENTALITIES. THE ARKANSAS DECISION, LIKE THAT OF THE COURT OF APPEALS IN *FARM CREDIT SERVICES*, CALLS INTO QUESTION THE DECISIONS OF OTHER STATE COURTS HOLDING THAT PRODUCTION CREDIT ASSOCIATIONS ARE TAXABLE AFTER GOVERNMENT OWNERSHIP IN THE ASSOCIATIONS CEASES.

The decision of the Arkansas Supreme Court that production credit associations are entitled to constitutional immunity from state taxation is incorrect in two respects. First, the Arkansas court erroneously interpreted 12 U.S.C. § 2077 to provide production credit associations with constitutional immunity from state taxation in the absence of an express waiver of the immunity in the present version of the statute. This interpretation was clearly erroneous, in part because the court disregarded the intent of Congress as expressed in the statute's history and its context in the Farm Credit Act. Second, the Arkansas court failed to apply the reasoning of this Court in *Farm Credit Services* regarding the significance of the statutory federal instrumentality designation, resulting in a decision that federal instrumentality status is, in and of itself, sufficient to entitle PCAs, which are not essential parts of the government, to implied immunity under the intergovernmental tax immunity doctrine.

I. The decision of the Supreme Court of Arkansas that production credit associations are constitutionally immune from state taxation as federal instrumentalities and the decisions of the courts of other states that upheld state taxation of privately owned PCAs result in inconsistent outcomes not intended by Congress when it amended 12 U.S.C. § 2077.

These are the same parties and the same merits issue that were before this Court in *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997). In his brief for the United States as *amicus curiae* in that case, the Solicitor General noted that the decision of the court of appeals erroneously construed 12 U.S.C. § 2077 in a manner that calls into question the imposition of tax by states on production credit associations following the termination of government ownership in the associations.

The lower court decision in *Farm Credit Services* was the decision of the Court of Appeals for the Eighth Circuit that production credit associations are immune from state taxation as statutorily defined federal instrumentalities in the absence of a waiver of the immunity implied under the Supremacy Clause of the United States Constitution. This Court granted Arkansas' petition for certiorari and held that the instrumentality status of production credit associations does not entitle the associations to the same exemption that the United States has from the Tax Injunction Act's restriction on federal court jurisdiction in the absence of the United States as a co-plaintiff. As a result, this Court did not reach the merits.

The Arkansas state court action seeking refunds of state taxes, which had been stayed during the proceedings in this Court, resumed following this Court's decision in *Farm Credit Services*. The Arkansas Supreme Court, like

the court of appeals, construed 12 U.S.C. § 2077 to hold that production credit associations are constitutionally immune from state taxation in the absence of an express waiver of the implied constitutional immunity in the present version of § 2077.

When Congress established PCAs in 1933, it expressly provided them with two exemptions from federal, state, and local tax. The first exempted the notes, debentures, bonds and other obligations issued by the associations. The second exempted the association itself, its property, its franchises, capital, reserves, surplus and other funds, and its income. Congress conditioned the second exemption upon government ownership (through the Production Credit Corporation) of PCA stock, providing for the exemption to expire when the stock ownership was transferred from the government to the PCA borrowers. Farm Credit Act of 1933, ch. 98, § 63, 48 Stat. 267 (1933).

Although by 1971 when Congress amended the Farm Credit Act the government no longer owned any PCA stock, Congress authorized the Governor of the Farm Credit Administration to purchase PCA stock in financial emergencies. Pub. L. No. 92-181, § 4.0, 85 Stat. 609 (1971). Congress retained both exemptions from tax, the exemption for the obligations of PCAs and the exemption for the associations, their property, and their income that was contingent upon government ownership of PCA stock. Pub. L. 92-181, § 2.17, 85 Stat. 602 (1971).

In 1962 following an assessment of Ohio franchise tax against the Columbus Production Credit Association for the years 1953 (when the government ceased to own stock in the association) through 1959, the Supreme Court of Ohio held that the language of the consent to state taxation in then Section 1138c, Title 12 U.S. Code (Farm Credit Act of 1933)

allowed Ohio to impose its franchise tax on the association. *Columbus Production Credit Ass'n v. Bowers*, 173 Ohio St. 97, 180 N.E.2d 1, cert. denied, 371 U.S. 826 (1962).

In 1964 the Court of Appeals of California, Third District held in *Woodland Production Credit Association v. Franchise Tax Bd.*, 225 Cal. App.2d 293, 37 Cal. Rptr. 231 (1964) that the language of the consent clause in 12 U.S.C. § 1138c (operative after retirement of stock held by the Production Credit Corporation) permits taxation of the association itself and thus a tax measured by the associationís net income "falls within the precise and explicit language of congressional consent." 225 Cal.App.2d at 296. The court observed, "It is difficult . . . to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities." *Id.* at 296. The court recognized that its holding was consistent with that of the Ohio Supreme Court in *Bowers, supra.*

Although the issue of taxation of the associations was not the issue to be decided in those cases, other state court decisions recognized that the associations were subject to state tax. *See Farmers Production Credit Association of South Burlington v. Vermont*, 481 A.2d 18 (Vt. 1984)(association subject to state property transfer tax); *Baker Production Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984 (Ore. 1966)(PCA conceded that it was subject to corporate excise tax following removal of its exemption in 1950).

Congress substantially amended the existing Farm Credit legislation in the Farm Credit Amendments Act of 1985. The amendments included the repeal of the government's authority to own stock directly in PCAs. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, 99th

Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Admin. News 2601-2602. In a "technical" amendment to 12 U.S.C. § 2077, at the time codified as 12 U.S.C. § 2098, Congress deleted the sentence which exempted the association from taxation and the sentence which conditioned the exemption upon government ownership of association stock. H.R.Rep. No. 425, *supra* at 2615; see Pub. L. No 99-205, § 205, 99 Stat. 1705.

The present statutory language of 12 U.S.C. § 2077, is materially the same as that following the 1985 amendment by the Farm Credit Amendments Act:[1]

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. § 2077 (1989).

All PCAs were privately owned prior to the 1971 amendment to the Farm Credit Act. H. R. Rep. No. 593, 92d Cong. 1st Sess., *reprinted in* 1971 U.S. Code Cong. &

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[1]The Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633, redesignated Section 2098 as Section 2077 without any change to the text. The Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998, amended Section 2077 by inserting a comma after "interest" and by adding "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority."

Admin. News 2091, 2098. Thus, at the time Congress amended § 2077 in 1985, the consent language, as interpreted by state courts, had allowed states to tax privately owned PCAs for almost twenty years. The interpretation that the amendment to the statute was not intended to change the taxation of production credit associations is consistent with these state courts' interpretations of the PCAs' tax status at the time of the amendment. *Davis v. Michigan*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.")

Congress established a specific statutory "taxation" section for each of the Farm Credit System entities at the time it established them, and retained these taxation sections, subject to any subsequent amendments. The present taxation sections for farm credit banks (resulting from the mergers of Federal land banks and federal intermediate credit banks), 12 U.S.C. § 2023, and for federal land bank associations, 12 U.S.C. § 2098, were not amended in 1985 when the PCA taxation section and the banks for cooperatives taxation section (then 12 U.S.C. § 2134) were amended. The more extensive immunity afforded those entities is currently expressed for farm credit banks as follows, with similar language for federal land bank associations:

> The Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed. The mortgages held by the Farm Credit Banks and the notes, bonds, debentures, and other obligations issued by the banks shall be

> considered and held to be instrumentalities of the United States and, as such, they and the income therefrom shall be exempt from all Federal, State, municipal, and local taxation, other than Federal income tax liability of the holder thereof under the Public Debt Act of 1941.

12 U.S.C. § 2023 (1989).

Had Congress intended that, following its amendment to the taxation section in 1985, PCAs have an immunity similar to the immunity Congress extended to other entities within the Farm Credit System, or comparable to the immunity Congress provided to PCAs when the government owned PCA stock, it would likely have amended the statute in a manner to provide that immunity expressly. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(internal quotation marks omitted.)

The effect of the 1985 amendment, according to the Arkansas decision, is to grant constitutional immunity from taxation to production credit associations. The court's statutory construction analysis involved consideration of the present version of 12 U.S.C. § 2077 to determine if a consent to taxation currently existed. "The current version of § 2077 with its silence on the issue [of waiver], compels a holding of immunity because, where Congress is silent, the tax immunity of federal instrumentalities is implied." (P. App. A1-5). "We have examined the language of the statute, 12 U.S.C. § 2077, and hold that it does not contain an express waiver of the tax exemption conferred by the doctrine of intergovernmental tax immunity." (P. App. A1-6).

This language from the opinion reveals that the Arkansas court discounted evidence of congressional intent with regard to the taxation of production credit associations, including the language of the statute prior to its amendment in 1985 and its context within the Farm Credit Act. Consideration of evidence of congressional intent is consistent with the dictates of this Court that it is Congress' province to decide which and to what extent federal instrumentalities are entitled to immunity from state taxation. *See North Dakota v. United States*, 495 U.S. 423, 433 (1990)("The Court has more recently adopted a functional approach to claims of governmental immunity accommodating of the full range of each sovereign's legislative authority and respectful of the primary role of Congress in resolving conflicts between National and State Governments."); *United States v. City of Detroit*, 355 U.S. 466, 474 (1958)("Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.")

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court considered a statute which, like the PCA statute, failed to contain an express waiver of immunity, previously contained therein, after amendment. The Court declined to find that the deletion of the express waiver of immunity indicated that Congress intended to repeal the waiver and "diametrically change course by implicitly barring state taxation." 490 U.S. at 182.

The interpretation of 12 U.S.C. § 2077 adopted by the Arkansas court results in implied immunity as extensive as, if not greater than, the express immunity originally conferred by Congress, but waived when PCAs became privately owned. Such an interpretation is contrary to the

intent of Congress as evidenced by the history of the Congressional treatment of the taxation of PCAs. Further, such an interpretation calls into question decisions of other state courts holding that PCAs are subject to state taxation when they become farmer-owned.

II. The Arkansas Supreme Court's analysis of whether the statutory designation of a PCA as a federal instrumentality is, in and of itself, sufficient to exempt a PCA from state tax in the absence of consent failed to properly apply the reasoning employed by this Court in *Arkansas v. Farm Credit Services* concerning the significance of the statutory designation of a PCA as a federal instrumentality.

This Court has not decided whether statutory designation of an entity as a federal instrumentality alone entitles such an entity to implied immunity from state taxation. However, in *Farm Credit Services* the Court held that the statutory designation of PCAs as federal instrumentalities is not sufficient for purposes of the immunity the government enjoys from the Tax Injunction Act. The reasoning in that opinion suggests that the instrumentality designation is not sufficient for purposes of implied immunity of PCAs from state taxation, especially when considered in conjunction with the indications that Congress intended PCAs to become subject to state tax when government ownership terminated.

Although the Court did not reach the taxation issue in *Farm Credit Services*, the Court clearly stated that although the statutory designation is significant, statutory instrumentality status alone is not sufficient to confer upon such an entity all of the rights and privileges of the United States.

> True, important consequences flow from the congressional decision to designate a PCA formed pursuant to statute as "an instrumentality of the United States." The tax immunity a PCA has under § 2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all of the rights and privileges of the National Government.

Farm Credit Services, 520 U.S. at 829.

In deciding that instrumentality status is not sufficient to entitle production credit associations to the same exemption the United States has under the Tax Injunction Act, the Court considered the governmental nature of PCAs to be significant.

> The PCAs' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States.

Farm Credit Services, 520 U.S. at 831- 832.

In a case in which an entity other than a statutory federal instrumentality sought exemption from state taxation as a tax-immune federal instrumentality, the Court examined

the governmental nature of the entity to determine whether it should be immune. For example, in *Department of Employment v. United States*, 385 U.S. 355, 358-359 (1966), the Red Cross claimed it was a federal instrumentality and was immune from state withholding tax. The Court relied on the Federal charter of the Red Cross, government supervision and regulation of the Red Cross, the appointment of its principal officer and seven of its 49 governors by the President, its obligation to perform a wide variety of functions indispensable to the workings of the armed forces, its receipt of substantial material assistance from the Federal Government, and a recognition that the President and Congress have recognized the "Red Cross' status virtually as an arm of the Government" to determine that the Red Cross was sufficiently necessary to the continued operations of the government to be immune from state tax. *Id.*, 385 U.S. at 359-360. The Court stated, "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." *Id.*, 385 U.S. at 358-359 (1966).

The Arkansas Court did not apply this reasoning in its decision, instead concluding that the statutory designation of production credit associations as federal instrumentalities is sufficient to entitle them to implied immunity. In its opinion the Arkansas court stated:

> PCAs are federal instrumentalities, clearly designated as such by federal statutes. Once it has been determined that the PCAs are federal instrumentalities, there arises an implied immunity from state and local taxation. *M'Culloch v. Maryland, supra.* In order to subject federal instrumentalities such as PCAs to state taxation, Congress must enact a clear waiver of their exemption. *Department of Employment v. United States*, 385 U.S. 355 (1966). (P. App. A1-5).

This Court's recent decisions concerning the issue of intergovernmental tax immunity have focused on limiting the immunity to state taxes that are imposed directly on the Federal Government or which discriminate against it. *See, e.g., Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 811 (1989)("After Graves, therefore intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.")

A decision such as the Arkansas decision that establishes immunity in the absence of Congressional waiver based solely upon Congress' designation of the entity as a federal instrumentality is contrary to the reasoning in *Farm Credit Services* and to the evolution of the intergovernmental tax immunity doctrine as interpreted by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court review the issue of whether the statutory designation of a production credit association as a federal instrumentality is sufficient, in and of itself, to bestow upon the association constitutional immunity from state taxation, especially where the intent of Congress, as expressed in 12 U.S.C. § 2077 prior to the 1985 amendment, indicates that Congress intended to subject the associations to state taxation once government ownership in the associations ceased, and that the Court reverse the decision of the Supreme Court of Arkansas that the associations are entitled to constitutional immunity from state taxation.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS
No. 98-1518

STATE OF ARKANSAS,
APPELLANT,

VS.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, *ET AL.*
APPELLEE,,

OPINION DELIVERED
JUL 01 1999

APPEAL FROM THE PULASKI COUNTY CHANCERY COURT, NO. 94-493 1 HON. ALICE S. GRAY, JUDGE.

AFFIRMED.

RAY THORNTON, Associate Justice

The State of Arkansas, appellant, brings this appeal of the decision of the Pulaski County Chancery Court which found that appellees,, four Production Credit Associations, are entitled to immunity from state sales and income taxation by virtue of their status as "federal instrumentalities." Because we agree with the chancery court that absent express congressional waiver, the PCAs are entitled to immunity from state taxation, we affirm the chancellor's grant of appellees" summary judgment motion.

Appellees, Farm Credit Services of Central Arkansas, Farm Credit Services of Western Arkansas, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, are Production Credit Associations (PCAs), corporations chartered under the Farm Credit Act of 1971. These corporate financial institutions, organized by ten or more farmers to provide loans and other banking services to farmers, are entities of the Farm Credit System, a government-sponsored enterprise created by Congress in 1916. The Federal Farm Loan Act, Pub. L. No. 64-158; 39 Stat. 360 (1916). In 1933 Congress established Production Credit Associations to carry out the federal purposes of providing agricultural credit to American farmers, and for a time, the government owned stock in PCAs in order to encourage and assist the PCAs. *See* H.R. Rep. No. 593, 92d Cong. 1st Sess. 8 (1971), Farm Credit Act of 1933, ch. 98, § 23, 48 Stat. 261.

The Farm Credit Act, Pub. L. No. 73-98; 48 Stat. 257 (1933), established twelve district federal land banks to make long-term loans to farmers through federal land bank associations. PCAs are designated by 12 U.S.C. §§ 2017 and 2077 as "federal instrumentalities." Each association is a member of the Farm Credit System, which is divided into seven districts. Arkansas is part of the seventh farm credit district, known as Agribank,, and is divided into four farm credit territories. Each association is restricted to certain territories outlined in its charter, and they are limited to making agricultural-purpose loans only to farmers who are members, operating on a cooperative basis.

In 1994, appellees,, the four Arkansas PCAs, requested a refund of state income and sales taxes paid within the refund limitations period, claiming that they paid the taxes in error, because their status as "federal instrumentalities" exempts them from state taxation under

the constitutional doctrine of intergovernmental tax immunity. Appellant, through the Department of Finance and Administration (hereinafter "The Department,") denied their request. The PCAs brought suit in the Pulaski County Chancery Court contesting the denial of the refund.[1] Both parties moved for summary judgment. On July 1, 1998, the trial court granted the PCAs' motion, holding that PCAs are federal instrumentalities immune from state tax unless Congress waives that immunity, that Congress has not expressly waived that immunity for PCAs, and, therefore, that their status as federal instrumentalities renders them exempt from state taxation. The judgment ordered the Department to refund state income and sales taxes to the

---

[1]The PCAs simultaneously filed suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, seeking a declaratory judgment that they were exempt from state taxation and for an injunction against collection of future taxes. In 1995, in an unreported decision, United Stated District Judge Henry Woods granted the PCAs motion for summary judgment, finding that their statutory designation as a federal instrumentality exempts them from state taxation under the implied immunity doctrine and that states cannot tax them in the absence of a statute which clearly and affirmatively waives this implied immunity. The Department appealed to the United States Court of Appeals for the Eighth Circuit, which upheld the district court's decision. *Farm Credit Services of Central Arkansas, PCA et al. v. State of Arkansas*, 76 F.3d 961 (8th Cir. 1995).

The PCAs then moved for summary judgment in Pulaski County Chancery Court, on the grounds that appellant was collaterally estopped by the Eighth Circuit decision from relitigating the legal issue of the PCAs' entitlement to exemption. The Department responded with a petition for writ of *certiorari* to the United States Supreme Court, which was granted. The Pulaski County Chancery Court stayed its decision pending the outcome of the Supreme Court case. The Supreme Court did not address the merits of the exemption issue but held that the federal court lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, to consider the merits when the question could be presented to a state court, and when the instrumentality was not joined by the United States as a co-plaintiff. *Arkansas v. Farm Credit Services of Central Arkansas, et al.*, 520 U.S. 821 (1997).

PCAs; the total sum at issue amounts to more than $1.2 million dollars, plus ten percent interest. The Department filed this appeal, contending that the trial court erred by deciding the issue of the PCAs' exemption from state tax based upon the doctrine of intergovernmental tax immunity, as expressed and developed in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819) and its progeny, rather than upon 12 U.S. § 2077, a statutory exemption from federal and state taxation granted by Congress. In the alternative, the Department asserts that the trial court erred in holding that federal instrumentality status, in and of itself, is sufficient to entitle PCAs, who they assert are not essential parts of government, to implied immunity under the tax immunity doctrine. The Department does not, however, challenge the constitutionality of the federal statute on the basis that Congress lacked authority to designate PCAs as instrumentalities of the United States, but, rather, asks us to construe the statute itself and conclude that notwithstanding their designation as an "instrumentality," the PCAs are taxable.

This court reviews issues of statutory construction *de novo;* it is for this court to decide what a statute means.Arkansas Depit.of Health v.Westark Christian Action, 322 Ark. 440, 910S.W.2d 199 (1995). We are not bound by the decision of the trial court. However, in the absence of a showing that the trial court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. *Bryant v. Weiss,* 335 Ark. 534, 983 S.W.2d 902 (1998). The statute at issue reads:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other such obligations issued by such associations shall be exempt, both as to principal and interest, from all

> taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. § 2077 (1989).

As the Supreme Court first held *in M'Culloch v. Maryland, supra,* because of the Supremacy Clause of the United States Constitution, states have no power to tax federally-created instrumentalities absent congressional authorization. "[T]he states states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Id.* The doctrine of intergovernmental tax immunity is well understood, based upon principles of dual sovereignty. Our federal government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity. *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist.* #1, 657 F.2d 183 (8th Cir. 1981)(citing *United States v. City of Adair,,* 539 F.2d 1185 (8th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977), *affd, 455* U.S. 995 (1982).

PCAs are federal instrumentalities, clearly designated as such by federal statutes. Once it has been determined that the PCAs are federal instrumentalities, there arises an implied immunity from state and local taxation. *M'Culloch v. Maryland, supra.* In order to subject federal instrumentalities such as PCAs to state taxation, Congress must enact a clear waiver of their exemption. *Department of Employment v.*

United States, 385 U.S. 355 (1966). Once federal immunity from taxation is established, Congress must express any waiver of that immunity as a "clear, express, affirmative desire." *Federal Reserve Bank of St. Louis, supra.*. We note that 12 U. S.C. § 2077 does not contain an express waiver of constitutional immunity from taxes derived from the doctrine of intergovernmental tax immunity.

The current statutory enactment by Congress dealing with state taxation of PCAs states that "all notes, debentures, and other obligations" of the associations are exempt from state and federal taxation. 12 U.S.C. § 2077. The Department contends that because prior versions of the statute expressly exempted their "capital, reserves, surplus, and other funds, and their income," Farm Credit Act of 1971, Pub. L. No. 92-181, § 2.17, 85 Stat. 583 (1971); Farm Credit Act of 1933, Pub. L. No. 73-75, § 63, 48 Stat. 257 (1933), and the current statutory provision no longer contains such additional immunity language, Congress has waived the PCAs' exemption. However, we do not find that argument persuasive. The current version of § 2077, with its silence on the issue, compels a holding of immunity because, where Congress is silent, the tax immunity of federal instrumentalities is implied. *See Graves v. New York ex ref. O'Keefe,* 306 U.S. 466 (1939). *See also Farm Credit Services of Mid-America v. Department of State Revenue,* 705 N.E.2d 1089 (Indiana Tax Ct. 1 999)(Because Congress had not waived the Agricultural Credit Association's immunity from state taxation, under the Supremacy Clause, Indiana was without power to collect state tax from the association. "With respect to federal instrumentalities, it is the waiver and not the immunity which must be explicit.") We have examined the language of the statute, 12 U.S.C. § 2077, and hold that it does not contain an express waiver of the tax exemption conferred by the doctrine of intergovernmental tax immunity.

We have concluded that the decision of the Pulaski County Chancery Court in granting the PCAs' motion for summary judgment was correct and affirm the judgment in their favor for the refund of amounts paid as state income taxes and state sales taxes.

Affirmed.

APPENDIX B

IN THE CHANCERY COURT OF PULASKI COUNTY
ARKANSAS FIRST DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA,- EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

PLAINTIFFS

vs.

NO. 94-4931

STATE OF ARKANSAS

DEFENDANT

ORDER

On this date came on to be heard Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Summary Judgment. Plaintiffs appeared represented by Charlie Compton and by and through their attorneys, Mark Nichols and Rufus Wolff. Defendant appeared by and through its attorneys, Martha Hunt and Mary Cameron. From the pleadings, the Court Finds and Orders as follows:

It is undisputed by the parties that the Plaintiffs are federal instrumentalities. Plaintiffs are production credit associations (PCAs) chartered by the Farm Credit Act of 1971. 12 U.S.C. sections 2071 and 2077. PCAs are identified as federal instrumentalities in three parts of the Farm Credit Act of 1971. 12 U.S.C. sections 2071 (a), (b)(7), 2077. Therefore, UPCA's are instrumentalities of the United States because the statute which charters them says so." *Arkansas*

v. Farm Credit Services, 520 U.S._____,_____, 138 L. Ed. 2d 34, 39, 117 S. Ct._____, _____ (1997).

It is long established that federal instrumentalities are immune from state taxes unless Congress specifically waives that immunity. *McCulloch v Maryland,* 17 U S 316 (1819). Therefore, the doctrine of tax immunity announced in *McCulloch* applies when a statute is silent on taxation. Congress addresses tax exemption for the PCAs in only one section of the United States Code.

Each production credit association and its obligations are instrumentalities of the United States and as such any and all *notes. debentures. and other obligations issued by such associations shall be exempt,* both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder. 12 U S C section 2077 (emphasis added). While "notes, debentures, and other obligations issued by such associations" are specifically exempted from most state taxation, the only express *waiver* of immunity from state taxation contained in the section applies solely to surtaxes, estate taxes, inheritance taxes and gift taxes imposed on those notes, debentures and other obligations Thus Congress provides no express waiver of immunity from state income and sales taxes for the PCAs Defendant argues that mere designation as a federal instrumentality in a statute is insufficient in itself to confer tax exempt status. Defendant contends that only federal instrumentalities which are sufficiently connected to the National Government are entitled to implied governmental immunity from taxation. Yet the Defendant is unable to direct the Court to a case in which an entity that Congress specifically designated a federal instrumentality was required

to established its connection with the National Government before proving its entitlement to state tax exemption.

"[W]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (1981). Because Congress provided no express waiver of immunity from state income and sales taxation in any statute, the PCAs' status as federal instrumentalities renders them exempt from such taxation.

Accordingly, Plaintiff's Motion for Summary Judgment should be, and hereby is, granted. Defendant's Motion for Summary Judgment is denied for the foregoing reasons.

IT IS SO ORDERED.

ALICE S. GRAY, CHANCELLOR

DATE JUN 1998

APPENDIX C

12 U.S.C. § 2071. Organization and charters

(a) Charter

Each production credit association shall continue as a Federally chartered instrumentality of the United States. ((b)) Organization

(1) In general

Production credit associations may be organized by 10 or more farmers or ranchers or producers or harvesters of aquatic products desiring to borrow money under the provisions of this part.

(2) Articles of association

The proposed articles of association shall be forwarded to the Farm Credit Bank for the district accompanied by an agreement to subscribe on behalf of the association for stock in the bank in such amounts as may be required by the bank.

(3) Contents of articles

The articles shall specify in general terms the -

(A) objects for which the association is formed;

(B) powers to be exercised by the association in carrying out the functions authorized by this part; and

(C) territory the association proposes to serve.

(4) Signatures

The articles shall be signed by persons desiring to form such an association and shall be accompanied by a statement signed by each such person establishing eligibility to borrow from the association in which such person will become a stockholder.

(5) Copy to FCA

A copy of the articles of association shall be forwarded to the Farm Credit Administration with the recommendations of the bank concerning the need for such an association in order to adequately serve the credit needs of eligible persons in the proposed territory and whether that territory includes any area described in the charter of another production credit association.

(6) Denial of charter

The Farm Credit Administration for good cause shown may deny the charter.

(7) Approval of articles

On approval of the proposed articles by the Farm Credit Administration, and on the issuance of a charter, the association shall become as of such date a federally chartered body corporate and an instrumentality of the United States.

(8) Powers of FCA

The Farm Credit Administration shall have the power, under rules and regulations prescribed by the Farm Credit Administration or by prescribing in the terms of the charter, to

(A) provide for the organization of the association;

(B) province for the initial amount of stock of the association;

(C) provide for the territory within which the association's operations may be carried on; and

(D) approve amendments to the charter of the association's

12 U.S.C. § 2077. Taxation

Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

(2)

No. 99-993

In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a petition for writ of certiorari, filed by an attorney not authorized to represent the petitioner before this Court, validly invoke this Court's jurisdiction?

2. Has Congress authorized the State of Arkansas to impose income and sales taxes on production credit associations, which are fiscal institutions chartered by Congress and federal instrumentalities?

DISCLOSURE UNDER SUPREME COURT RULE 29.6

None of the respondents, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, has a parent corporation, and no publicly held company owns 10% or more of the stock of any respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

DISCLOSURE UNDER SUPREME COURT RULE 29.6 ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Jurisdiction 2

The Farm Credit Amendments Act of 1985 5

REASONS FOR DENYING THE WRIT 6

The Petition Does Not Properly Invoke This Court's Jurisdiction 7

The Decision Below Does Not Conflict with Any Decisions of This Court or of the Other Federal and State Courts That Have Considered the State Taxability of Fiscal Institutions Chartered By Congress Which are Federal Instrumentalities 8

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997) 13

Columbus Production Credit Association v. Bowers, 180 N.E.2d 1 (Ohio 1962), *cert. denied*, 371 U.S. 826 (1962) 12, 14

Farm Credit Services of Mid-America, ACA v. Indiana Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax Ct. 1999) 10, 11, 13

Federal Election Commission v. NRA Political Victory Fund, 513 U.S. 88 (1994) 7

Federal Land Bank of Wichita v. Board of County Commissioners, 788 F.2d 1440 (10th Cir. 1986) 10

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 9, 10

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 10, 11, 13

Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation ___ So.2d ___, 1999 La. App. LEXIS 3095 (La. Ct. App. 1999) 11

United States v. Michigan, 851 F.2d 803 (6th Cir. 1988) 10

United States v. State Tax Commission, 481 F.2d 963 (1st Cir. 1973) 9, 10

Woodland Production Credit Association v. Franchise Tax Board, 225 Cal. App. 2d 293 (1964) 12, 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

12 U.S.C. § 2001 8

12 U.S.C. § 2071 8

12 U.S.C. § 2077 ..... 2, 5, 8

28 U.S.C. § 2101(c) 1, 7

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686 (1985) 15

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 205, 99 Stat. 1678, 1705 (1985) 15

OTHER:

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985) 6, 8, 15

JURISDICTION

The petition for writ of certiorari in this case was filed by an attorney who may not have been authorized to represent the State of Arkansas before this Court at the time the petition was filed. The question of the attorney's authority is currently pending before the Arkansas Supreme Court. If such authority was lacking, the petition should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

12 U.S.C. § 2077:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

STATEMENT OF THE CASE

Jurisdiction

The petition for writ of certiorari omits facts which raise a threshold question regarding this Court's jurisdiction.

The decision of the Arkansas Supreme Court was issued on July 1, 1999. On September 28, 1999, a petition for writ of certiorari on behalf of the State of Arkansas was filed by Martha Grissom Hunt, an attorney with the Arkansas Department of Finance and Administration. On October 14, 1999, the Clerk's office returned the petition for writ of certiorari for failure to comply with Supreme Court Rule 33, and gave the State of Arkansas until December 13, 1999, to submit a corrected petition.

Ark. Code Ann. § 25-16-703(a), provides:

> The Attorney General shall maintain and defend the interest of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the State are involved.

On November 23, 1999, respondents filed a petition for writ of mandamus with the Chancery Court, Pulaski County, Arkansas, alleging that only the Attorney General of Arkansas is authorized to file a petition for writ of certiorari on behalf of Arkansas with this Court, and challenging Ms. Hunt's authority to file such a petition. Respondents requested the chancery court to prohibit Ms. Hunt from filing a petition for writ of certiorari in this matter. On November 24, 1999, the chancellor issued a verbal order granting respondents' petition and prohibiting the Department of Finance and Administration, and its attorneys, from filing a petition for writ of certiorari with this Court. The verbal order was subsequently reduced to writing. A copy of the chancery court's written order is included in Appendix A of this brief.

Subsequent to the issuance of the chancery court's order, the Department of Finance and Administration requested the Attorney General of Arkansas to represent the State's interest and submit the corrected petition. By letter dated December 2, 1999, the Attorney General declined the Department's request.

The Department of Finance and Administration then requested the Governor of Arkansas to appoint Ms. Hunt, the Department's attorney, to represent the State in this

matter. The Governor granted this request and executed a letter, dated December 2, 1999, authorizing Ms. Hunt to represent the State before this Court.

On December 3, 1999, the Department of Finance and Administration filed a motion in the chancery court seeking reconsideration of the chancery court's November 24, 1999 order. Upon reconsideration, a second chancellor reconfirmed that the Department of Finance and Administration, and its attorneys, lacked authority to represent Arkansas in this matter pursuant to Ark. Code Ann. § 25-16-703(a). Further, the chancery court determined that the action taken by the Governor was ineffective to divest the Attorney General of his mandatory duties and obligations under Ark. Code Ann. § 25-16-703(a). A copy of the chancery court's ruling is included in Appendix B of this brief.

On December 8, 1999, the Department of Finance and Administration filed a petition for writ of certiorari with the Arkansas Supreme Court. The petition asked the Arkansas Supreme Court to determine that Ms. Hunt had authority to represent the State of Arkansas in this matter. The Department also filed a motion for expedited consideration and application for temporary relief.

The Arkansas Supreme Court did not rule on the merits of the Department's petition for writ of certiorari, but did grant the motion for expedited consideration and stayed the chancery court's writ of mandamus and the order denying reconsideration. On the merits, the Arkansas Supreme Court ordered the parties to file briefs on the question of Ms. Hunt's authority, and to also brief

the question of whether the chancery court had jurisdiction to entertain respondents' petition for writ of mandamus. Briefs on these questions were filed on December 22 and December 29, 1999. The case was submitted to the Arkansas Supreme Court on January 6, 2000. A copy of the Arkansas Supreme Court's order is included in Appendix C of this brief. To date, the Arkansas Supreme Court has not ruled on the merits of the Department's petition.

On December 13, 1999, Ms. Hunt filed a corrected petition for writ of certiorari on behalf of the State of Arkansas with the Clerk of this Court.

The Farm Credit Amendments Act of 1985

The petition for writ of certiorari also omits certain facts relevant to a proper understanding of the 1985 amendment to 12 U.S.C. § 2098, the predecessor of the current 12 U.S.C. § 2077.[1] In response to the agricultural depression in 1985, Congress did more than merely reorganize and strengthen the Farm Credit Administration. Congress also authorized the United States Treasury to provide new federal financial assistance to the Farm Credit System. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686 (1985). This new federal support was provided to avoid the risk of Farm Credit System insolvency. The Report of the House Committee on Agriculture explained:

---

[1] The Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633, redesignated Section 2098 as Section 2077 without any change to the text.

> Without question, the U.S. agriculture industry cannot afford the disintegration of the Farm Credit System. Moreover, American Society has an important stake in the continued viability of the System.
>
> These legitimate and serious concerns form the basis of the committee's action in reporting H.R. 3792.

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 11.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for writ of certiorari for two reasons. First, the petition was filed by an attorney who was not authorized under Arkansas law to represent the State of Arkansas before this Court. Thus, the petition does not properly invoke this Court's jurisdiction.

Second, the decision of the Arkansas Supreme Court applied settled legal principles, and correctly determined that Congress has not authorized Arkansas to tax production credit associations. The Arkansas Supreme Court's decision is fully consistent with the decisions of this Court, the lower federal courts, and the state courts, that have considered the state taxability of fiscal institutions chartered by Congress which are federal instrumentalities.

The Petition Does Not Properly Invoke This Court's Jurisdiction

In *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), this Court considered the effect of a petition for writ of certiorari filed by an attorney who was not authorized to represent the petitioner. That case involved a petition filed by a Federal Election Commission ("FEC") attorney on behalf of the FEC. The Court first concluded that only the Solicitor General was authorized to file a petition for writ of certiorari on behalf of the FEC. The Court then concluded that, while the Solicitor General had later authorized the FEC to represent itself before the Court, the Solicitor General's authorization came after the deadline for filing the petition for writ of certiorari and was thus ineffective to rehabilitate the original petition. The Court suggested that to permit such an after the fact authorization would be inconsistent with the time requirements of 28 U.S.C. § 2101(c). For these reasons, the Court dismissed the FEC's petition for want of jurisdiction.

In this case, respondents challenge the authority of an attorney for the Arkansas Department of Finance and Administration to represent the State of Arkansas in a petition for writ of certiorari to this Court. This is, of course, strictly a question of Arkansas law. Two separate chancellors of the Chancery Court, Pulaski County, Arkansas, have concluded that, under Arkansas law, an attorney for the Department of Finance and Administration is not authorized to file a petition for writ of certiorari to this Court on behalf of the State of Arkansas. This issue is now before the Arkansas Supreme Court.

Unless the Arkansas Supreme Court reverses the chancery court decisions and finds that Ms. Hunt, the Department's attorney, was authorized to file the petition for writ of certiorari *at the time of initial filing* on September 28, 1999, the petition should be found to be unauthorized and denied.

The Decision Below Does Not Conflict With Any Decisions of This Court, or of the Other Federal and State Courts That Have Considered the State Taxability of Fiscal Institutions Chartered By Congress Which are Federal Instrumentalities

Respondents, production credit associations, are member institutions of the Farm Credit System, chartered by Congress to provide sound and affordable credit to American agriculture. 12 U.S.C. § 2001. As recognized by Congress, the Farm Credit System is critical to the functioning of American agriculture. H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 11. Production credit associations are also designated by Congress as federal instrumentalities. 12 U.S.C. §§ 2071 and 2077. The Arkansas Supreme Court held that Arkansas has no power to tax production credit associations in the absence of Congressional authorization. *Appendix to petition for writ of certiorari*, at A5. Finding no Congressional authorization to tax, the Arkansas Supreme Court correctly held that production credit associations are exempt from Arkansas sales and income taxes.

It is well settled law that fiscal institutions chartered by Congress, including respondents, are exempt from state taxation in the absence of Congressional authorization to tax. This Court, and the lower federal courts, have

routinely applied this rule to determine the state taxability of federally chartered fiscal institutions.

In *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), this Court considered the liability of a national bank for Massachusetts sales tax. The Court stated:

> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664, 668; *Des Moines Nat. Bank v. Fairweather*, 263 U.S. 103, 106; *First Nat. Bank v. Hartford*, 273 U.S. 548, 550; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 244.

392 U.S., at 340. The Court went on to conclude that Congress had not authorized Massachusetts to impose the taxes in question.

The federal courts of appeals apply the same rule. In *United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), the Court of Appeals for the First Circuit considered the state taxability of federal savings and loan associations. The court stated:

> It is true that the federal associations, being federal instrumentalities, are immune from state taxation by virtue of the Supremacy Clause, absent specific Congressional authorization. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819); *Agricultural Bank v. Tax Comm'n, supra*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138.

481 F.2d, at 969. In *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440 (10th Cir. 1986), the Court of Appeals for the Tenth Circuit considered the state taxability of federal land banks which, like production credit associations, are member institutions of the Farm Credit System, and statutorily designated federal instrumentalities. The court stated:

> A state cannot tax a federal instrumentality absent permissive federal legislation. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968).

788 F.2d, at 1441. In *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit considered the state taxability of federal credit unions. The court stated:

> In the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court established the doctrine of federal immunity from state taxation. In that case, the Court held that, absent Congressional consent, the federal government and its instrumentalities are immune from state taxation under the Supremacy Clause of the Constitution.

851 F.2d, at 805.

The state courts that have considered the state taxability of federally chartered fiscal institutions have also uniformly applied the rule that such entities are exempt from state tax absent Congressional authorization. For example, in *Farm Credit Services of Mid-America, ACA v. Indiana Department of State Revenue*, 705 N.E.2d 1089 (Ind.

Tax Ct. 1999), the Indiana Tax Court considered whether Indiana could tax agricultural credit associations which, like respondents, are member institutions of the Farm Credit System. The court stated the applicable test as follows:

> In *Farm Credit Services*, 677 N.E.2d at 647, the Court stated that "[t]he parties do not dispute the time-honored rule that the federal government and its instrumentalities are immune from state and local taxation absent express waiver by Congress." In this case, the Department contends that there is no such rule and that federal instrumentalities are subject to state taxation unless Congress expressly exempts them from state taxation. The Court cannot agree.
>
> The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

705 N.E.2d, at 1092. This decision is currently on appeal to the Indiana Supreme Court. Similarly, in *Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation*, ___ So.2d ___, 1999 La. App. LEXIS 3095 (La. Ct. App. 1999), the Louisiana Court of Appeals stated with regard to the taxation of production credit associations:

> In order for federal instrumentalities such as PCAs to be subject to state taxation, Congress must enact clear waivers of their exemptions.

1999 La. App. LEXIS 3095, at 9.

In an attempt to paint a conflict between the Arkansas Supreme Court decision and those of other state courts, petitioner cites the Ohio Supreme Court decision in *Columbus Production Credit Association v. Bowers*, 180 N.E.2d 1 (Ohio 1962), *cert. denied*, 371 U.S. 826 (1962), and the California Court of Appeals decision in *Woodland Production Credit Association v. Franchise Tax Board*, 225 Cal. App. 2d 293 (1964). *Petition*, at 13. In fact, these decisions are fully consistent with the opinion below.

In *Columbus Production Credit Association*, the Ohio Supreme Court stated the guiding legal principle as follows:

> An instrumentality of the United States may not be taxed by a state unless Congress has granted consent to the state to tax.

180 N.E.2d, at 2. In *Woodland Production Credit Association*, the California Court of Appeals stated:

> Both parties agree that the association is an instrumentality of the United States. (12 U.S.C. § 1138c.) Thus its taxability is measured by the terms of congressional consent.

225 Cal. App. 2d, at 295. Thus, the decisions relied upon by petitioner to suggest a conflict apply the same legal rule as the Arkansas Supreme Court. They differ only in that they decided the taxability of production credit associations during years when Congress had actually authorized state taxation of such associations. As discussed below, pages 14-16, and as correctly found by the Arkansas Supreme Court, this Congressional authorization was subsequently repealed.

In a further attempt to create a conflict between the decision below and this Court's decisions, petitioner claims that the Arkansas Supreme Court failed to follow this Court's prior decision in this litigation, *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997). Petitioner claims that this Court's earlier opinion declared that statutory designation as a federal instrumentality is insufficient to make production credit associations exempt from state taxation, even if Congress has not authorized such taxation. *Petition*, at 18-19. Petitioner misreads this Court's decision in *Arkansas v. Farm Credit Services of Central Arkansas*.

This Court's opinion clearly states that the Court was not deciding respondents' claim of state tax exemption. 520 U.S., at 824. Rather, the Court held only that the Tax Injunction Act precluded federal court consideration of respondents' state tax exemption claim. To read the decision as enacting a new and novel legal rule for determining when federally chartered fiscal institutions, which are federal instrumentalities, are exempt from state taxation is to ignore the Court's own statements regarding the scope of its opinion. Moreover, it is to read the Court's decision as overruling *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and its progeny *sub silentio*. As the Indiana Tax Court observed in *Farm Credit Services of Mid-America, ACA*, the propriety of such a reading is "extremely unlikely." 705 N.E.2d, at 1093.

In the end, the decision by the Arkansas Supreme Court applies well settled law and involves only a question of statutory construction – has Congress authorized state taxation of production credit associations? The

Arkansas Supreme court properly answered this question in the negative.

Prior to 1985, Congress expressly authorized state taxation of production credit associations when the federal government had no investment in such associations. The authorization to tax was contained in the last sentence of 12 U.S.C. § 2098.[2] Section 2098 provided in full:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other such obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the

---

[2] It is this earlier version of Section 2098 that was at issue in *Columbus Production Credit Association, supra,* and *Woodland Production Credit Association, supra,* the cases relied upon by petitioner.

> preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

This Congressional authorization was repealed by Section 205 of the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 205, 99 Stat. 1678, 1705, which struck out the last two sentences of Section 2098.

The 1985 repeal of the states' authorization to tax production credit associations occurred simultaneously with Congressional approval of new federal investment in the Farm Credit System. However, the new federal investment was to be made indirectly through the Farm Credit System Capital Corporation, rather than directly in individual Farm Credit System institutions. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686.

Congress explained the reason for amending 12 U.S.C. § 2098 as follows:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. No. 425, at 28-29. Thus, the amendment to Section 2098 and the repeal of the prior authorization for states to tax production credit associations reflect the introduction of new and indirect federal investment in

the Farm Credit System in place of the prior direct investments in individual institutions. In light of these circumstances, it is both logical and proper to conclude, as the Arkansas Supreme Court did, that in 1985 Congress intended that production credit associations would no longer be subject to state taxation.

CONCLUSION

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION — PETITIONERS

vs. NO. OT99-6121

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, a Department of the State of Arkansas — RESPONDENT

WRIT OF MANDAMUS

Now having considered the Petition for Writ of Mandamus, the Defendant's Response to the Petition for Writ of Mandamus, evidenced adduced at the hearing, the arguments of counsel, and other things before the Court, the Court finds the following:

1. The decision of the Arkansas Supreme Court in *State of Arkansas v. Farm Credit Services of Central Arkansas, et al.*, 338 Ark. 322 (1999) ("Arkansas Proceeding") is a lawsuit initially brought by the Petitioners against the State of Arkansas claiming immunity from state taxes as a Congressionally-designated federal instrumentality.

2. The Department of Finance and Administration ("Department") is an agency of the State of Arkansas. At

all times, the Department has represented the State of Arkansas in the Arkansas Proceeding. On September 29, 1999, the Department filed a Petition for Writ of Certiorari on behalf of the State with the United States Supreme Court, requesting a review of the Arkansas Proceeding decision.

3. The Arkansas Attorney General has never represented the State in the Arkansas Proceeding or in connection with the filing of the Petition for Writ of Certiorari before the United States Supreme Court.

4. Ark. Code Ann. § 25-16-703(a) provides that: "The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the State are involved."

5. On November 23, 1999, Petitioners filed a Petition for Writ of Mandamus to prohibit the Department from defending and maintaining the State's interest before the United States Supreme Court as *ultra vires* and unauthorized by law.

6. On November 24, 1999, the Honorable Collins Kilgore, Second Division Chancellor, issued a verbal order granting the Plaintiffs' request for Writ of Mandamus to prohibit the Department and its lawyers from representing the State of Arkansas before the United States Supreme Court based upon the language of Ark. Code Ann. § 25-16-703(a).

7. On December 3, 1999, Judge Kilgore recused, prior to the entry of a written Order. This case was transferred to Sixth Division.

CONCLUSIONS OF LAW

1. This Court has jurisdiction because at the time the Writ of Mandamus was filed, the Department's representation of the State's interest before the United States Supreme Court is not authorized by Ark. Code Ann. § 25-16-703(a) and therefore *ultra vires*.

2. The provisions of Ark. Code Ann. § 25-16-703(a) are specific, clear and unambiguous. The Attorney General is the appropriate representative of the State's interest before the United States Supreme Court. The Department lacks independent authority to represent the State of Arkansas before the United States Supreme Court in this case.

3. Judge Kilgore's ruling from the bench granting petitioner's writ of mandamus on November 24, 1999 has been, and remains, in full force and effect from the time his ruling was issued from the bench.

It is CONSIDERED, ORDERED AND ADJUDGED that all of the Department's actions representing the State before the United States Supreme Court in the Arkansas Proceeding are not authorized by Ark. Code Ann. § 25-16-703(a), are *ultra vires* and that a writ of mandamus should issue prohibiting the Department and its attorneys from taking any action on behalf of the State of

Arkansas before the United States Supreme Court in the Arkansas Proceeding.

IT IS SO ORDERED, November 24, 1999.

HONORABLE MACKIE PIERCE,
CHANCELLOR

DATED: December 8, 1999

APPENDIX B

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION — PETITIONERS

vs. NO. OT99-6121

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, a Department of the State of Arkansas — RESPONDENT

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION, AND MODIFICATION OF, OR SUPPLEMENT, ORDER

Now having considered the Respondent's Motion For Reconsideration, And Modification Of, Or Supplement To, Order (hereinafter "Motion for Reconsideration"), the Respondent's Pretrial Brief, the arguments of counsel and other things before the Court, the Court finds the following:

1. That a Writ of Mandamus prohibiting the Department of Finance and Administration and it's attorneys ("Department") from representing the State before the United States Supreme Court against Petitioners was issued by Judge Collins Kilgore from the bench on

November 24, 1999. The Writ of Mandamus was filed on December ___, 1999, nunc pro tunc, November 24, 1999.

2. After Judge Kilgore issued the Writ of Mandamus on November 24, 1999, the Department requested that the Attorney General represent the State's interests by filing Petition for a Writ of Certiorari in the Supreme Court of the United States. By letter dated December 2, 1999, Attorney General Mark Pryor declined to represent the State's interests in this matter by filing the Writ of Certiorari.

3. By letter dated December 2, 1999, Governor Mike Huckabee executed a letter purporting to authorize the Department's lawyer, Ms. Martha G. Hunt as legal counsel to represent the State in the Arkansas Proceeding pursuant to Ark. Code Ann. § 25-16-702(c).

CONCLUSIONS OF LAW

1. Based upon Ark. Code Ann. § 25-16-703(a), the Department is not authorized to represent the State of Arkansas before the United States Supreme Court. No evidence has been presented by the Department to justify vacating the Writ of Mandamus issued in this case.

2. Ark. Code Ann. § 25-16-703(a) is mandatory, vesting the Attorney General with all power to defend and maintain the interest of the State of Arkansas before the United States Supreme Court.

3. All actions taken by the Department and the Governor pursuant to the general provisions of Ark. Code Ann. § 25-16-702(c) are ineffective to divest the Attorney

General of his mandatory duties and obligations under Ark. Code Ann. § 25-16-703(a).

The Court hereby Orders the following:

It is CONSIDERED, ORDERED AND ADJUDGED that the Respondent's Motion For Reconsideration, And Modification Of, Or Supplement To, Order is denied in its entirety.

IT IS SO ORDERED.

HONORABLE MACKIE PIERCE,
CHANCELLOR

DATED: December 8, 1999

APPENDIX C

ARKANSAS SUPREME COURT

No. 99-1432

Dick Barclay, Director, Arkansas Department of Finance & Administration, PETITIONER, V. Farm Credit Services, et al., RESPONDENT,	**Opinion Delivered December 10, 1999** PETITION FOR WRIT OF CERTIORARI; MOTION FOR EXPEDITED CONSIDERATION; APPLICATION FOR TEMPORARY RELIEF MOTION FOR EXPEDITED CONSIDERATION AND APPLICATION FOR TEMPORARY RELIEF GRANTED; BRIEFING ORDERED.

PER CURIAM

On July 1, 1999, we affirmed the chancery court's summary judgment ruling that the respondents, four Production Credit Associations, were entitled to immunity from state sales and income taxation by virtue of their status as "federal instrumentalities." *State of Arkansas v. Farm Credit Services of Central Arkansas*, 338 Ark. 322, ___ S.W.2d ___ (1999). On September 9, 1999, we granted the State's motion for stay of the mandate in that case, in order to allow the State to file a petition for writ of certiorari in the Supreme Court of the United States. Ark. S. Ct. R. 5-3(c).

On November 23, 1999, the respondents filed a petition for writ of mandamus in the Pulaski County Chancery Court, Second Division, which sought to enjoin the Department of Finance and Administration (DFA) and its attorneys from filing a petition for writ of certiorari in the Supreme Court. The respondents alleged in the petition that the DFA's actions violated Ark. Code Ann. Sec. 25-16-703(a) (Repl. 1996), which provides:

> The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved.

On November 24, 1999, the chancellor issued a verbal order granting the respondents' request for writ of mandamus to prohibit DFA and its attorneys from representing the State of Arkansas before the Supreme Court. Following the second division chancellor's recusal on December 3, 1999, the case was transferred to the Sixth Division of Pulaski County Chancery Court. On that same day, DFA filed a motion for reconsideration and modification of the chancellor's verbal ruling. On December 8, 1999, the sixth division chancellor issued a writ of mandamus prohibiting DFA and its attorneys from taking any action on behalf of the State of Arkansas before the United States Supreme Court in *State of Arkansas v. Farm Credit Services of Central Arkansas, supra*. The chancellor also denied DFA's motion for reconsideration and modification.

DFA promptly filed a petition for writ of certiorari in this court on December 8, 1999, along with a motion for expedited consideration and an application for temporary relief. The motion to expedite consideration of this matter is granted. Pending our expedited review of DFA's petition for writ of certiorari in this matter, we stay the writ of mandamus and the order denying reconsideration entered by the chancellor on December 8, 1999, in order to permit DFA and its attorneys to file a petition for writ of certiorari in the Supreme Court by the December 13, 1999 deadline in *State of Arkansas v. Farm Credit Services of Central Arkansas, supra*. The parties are ordered to brief the issues raised in DFA's petition for writ of certiorari, as well as the basis for the chancery court's jurisdiction to issue a writ of mandamus in this matter.

Supreme Court, U.S.
FILED
JAN 12 2000
OFFICE OF THE CLERK

(3)

No. 99-993

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, COLORADO, FLORIDA, IDAHO, LOUISIANA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW YORK, SOUTH DAKOTA, VERMONT, AND WISCONSIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF AMICUS INTEREST 1

REASONS FOR GRANTING THE WRIT

A. The Court Has Already Determined That The PCA Immunity Issue Is Worthy of Review, And The Reasons For Granting The Writ Have Not Diminished 3

B. This Case Presents An Excellent Vehicle To Decide PCA Immunity And Thereby Clarify The Principles State Taxing Authorities Should Apply When Confronting A Federally-Chartered Entity's Claim Of Tax Immunity 6

CONCLUSION 10

TABLE OF AUTHORITIES

PAGE

CASES:

Baker PCA v. State Tax Comm'n, 421 P.2d 984, 987 (Ore. 1966).....4

Arkansas v. Farm Credit Services of Central Arkansas, 519 U.S. 1085 (1997).....2,4

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997).....*passim*

Columbus PCA v. Bowers, 180 N.E. 2d 1 (Ohio 1962).....4

Department of Employment v. United States, 385 U.S. 355 (1966).....8

Farm Credit Services of Central Arkansas v. *Arkansas*, 76 F.3d 961 (1996).....3

Farm Credit Services of Mid-America v. Dep't of State Revenue, 705 N.E.2d 1089 (Ind. Tax Ct. 1999) 8

Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist #1, 657 F.2d 183 (8th Cir. 1981) 9

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).....8

United States v. City of Adair, 539 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), *aff'd*, 455 U.S. 995 (1982).....9

Woodland PCA v. Franchise Tax Board, 37 Cal. Rptr. 231 (App. 1964).....4

STATUTE:

12 U.S.C. §2077 3,6,7,9

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-993

STATE OF ARKANSAS,
Petitioner,

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, COLORADO, FLORIDA, IDAHO, LOUISIANA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW YORK, SOUTH DAKOTA, VERMONT AND WISCONSIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF AMICUS INTEREST

Ohio and 14 other states support Arkansas' petition for certiorari and urge the Court to reverse the decision of the Arkansas Supreme Court. At issue is the scope of immunity

from State and local taxation enjoyed by certain federally chartered lending institutions within the Farm Credit System, the production credit associations ("PCAs"). The case presents the question whether PCAs, as "federal instrumentalities," should be granted intergovernmental tax immunities beyond those immunities which Congress expressly provided by statute. At the urging of the States and the Solicitor General, the Court in 1997 granted certiorari over the same question between the same parties, while simultaneously granting certiorari over a threshold jurisdictional question. *Arkansas v. Farm Credit Services of Central Arkansas*, 519 U.S. 1085 (1997) (granting certiorari); *see also same case* 520 U.S. 821, 824-25 (opinion of the Court per Kennedy, J.) (discussing posture of the case and noting that "[e]ntitlement to the immunity is the underlying substantive issue, were we to reach it"). Ultimately, the Court in the prior case held the Tax Injunction Act had barred the district court from hearing the case, and for that reason the Court did not reach the merits of whether the lower court had properly granted additional immunities to the PCAs. 520 U.S. 821, 832.

Now the same merits question of how much immunity PCAs should enjoy, which the Court previously found worthy of review but did not reach, comes from the Arkansas Supreme Court unencumbered by jurisdictional difficulties. For the same reasons as before, the Court should grant certiorari here.

REASONS FOR GRANTING THE WRIT

A. The Court Has Already Determined That The PCA Immunity Issue Is Worthy of Review, And The Reasons For Granting The Writ Have Not Diminished.

Congress proclaimed PCAs to be "federal instrumentalities" and expressly immunized their "notes, debentures and other obligations" from federal, State and local taxation, 12 U.S.C. 2077. But in spite of Congress's enumerated grant of immunities, the Arkansas Supreme Court held PCAs additionally enjoy immunity from State corporate income and sales taxes. That is precisely what two judges of a three-judge panel of the Eighth Circuit held in the prior case, 76 F.3d 961 (1996). From the Eighth Circuit's decision, Arkansas petitioned for certiorari. It received support from Ohio and 12 other States.

In response to that petition, the Court sought the view of the Solicitor General, who complied by filing a brief that agreed with the States both that certiorari should be granted on this issue and that PCAs were not immune from state taxation. Accordingly, in addition to pointing out that the Tax Injunction Act had barred jurisdiction in the federal district court, the Solicitor General specifically asserted that the Eighth Circuit decision "construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest." U.S. Brief (On Petition For Writ of Certiorari), No. 95-1918, at 7.[1]

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[1] Citations to the U.S. brief in Case No. 95-1918 are to the brief submitted at the petition stage. The Solicitor General also filed a brief on the merits in support of Arkansas's position.

Certiorari was then granted over the merits issues, 519 U.S. 1085 (1997), with the Court additionally requiring the parties to brief and argue the Tax Injunction Act question. Ultimately, the Court reversed on the grounds that the Tax Injunction Act barred federal jurisdiction, 520 U.S. 821, and thereby did not reach the substantive issue of tax immunity. Thereafter, the PCAs pursued their refund claims in Arkansas state courts.

Now presented in the proper posture of a state court decision, the tax immunity issue is ripe for review by this Court. The reasons for granting certiorari remain compelling.

- The Arkansas Supreme Court opinion manifests the same error as the Eighth Circuit decision in the prior case. As a result, the very same conflict arises between the Arkansas Supreme Court's decision and the judgments of courts in other States as the Eighth Circuit's decision created in the prior case. *See Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio 1962) (statutory language conditioning broad tax immunity on government ownership constituted express consent to state corporate franchise taxation once all shares were in private hands); *Woodland PCA v. Franchise Tax Board*, 37 Cal. Rptr. 231 (App. 1964) (PCA's franchise subject to state taxation once PCA shares were all privately owned despite congressional declaration that PCA franchise is "federal instrumentality"). *Accord Baker PCA v. State Tax Comm'n*, 421 P.2d 984, 987 (Ore. 1966) (PCA conceded that "PCAs became subject to

state taxation whenever the government ownership of the stock was terminated").[2]

- The monetary stakes for the States have only increased in the interim. In seven (7) responding states, a partial and cursory survey reveals currently pending refund or reassessment claims involving PCAs or other Farm Credit System entities amounting to no less than sixteen million (16,000,000) tax dollars at issue.

- No action by Congress in the interim has clarified or altered the issues.

- Beyond the impact on State and local finances, the issue retains additional importance arising from the distortion of the competitive lending market. Special, extra-statutory tax breaks for Farm Credit System players mean an uneven playing field among themselves and with respect to competitors in the agricultural lending sector. At the merits stage in the prior case, the brief of amicus American Bankers' Association *et al.* highlighted this significant aspect of the issue.

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[2] These cases reflect what the Solicitor General in the last case justly called the "long-standing impositions of state taxes on production credit associations," but the erroneous reasoning of the Eighth Circuit in the last case and the Arkansas Supreme Court in this case appears to be infectious: amici are aware of at least two state tribunals that have immunized PCAs against corporate income or franchise taxation since the Arkansas Supreme Court decision at issue herein.

Because the Arkansas Supreme Court decision stands in conflict with other lower court decisions and presents the appropriate case to address an issue that retains its national importance, the Court should follow its prior decision to grant certiorari over the PCA immunity issue.

B. This Case Presents An Excellent Vehicle To Decide PCA Immunity And Thereby Clarify The Principles State Taxing Authorities Should Apply When Confronting A Federally-Chartered Entity's Claim Of Tax Immunity.

The Arkansas Supreme Court employed the same erroneous analysis that two of the Eighth Circuit judges adopted in the prior case. Namely, the lower court looked at Congress's designation of PCAs as "federal instrumentalities" at 12 U.S.C. 2077, and found that such status conferred broad tax immunity absent an express "waiver" by Congress. The state court adopted this theory in spite of the express grant of more limited immunity to PCA notes obligations and debentures that immediately follows the instrumentality designation in 12 U.S.C. 2077.

Just as troubling as the result itself is the absence in the Arkansas Supreme Court's opinion of any explanation about, or attempted refutation of, the objections and concerns raised by the States, by the Solicitor General, and by the non-PCA bankers in the last case. Specifically, the Arkansas Supreme Court failed to explain why the doctrine of *expressio unius* should not apply to limit tax immunities to those mentioned by Congress. Nor did the lower court offer any reason to disregard the unbroken legislative history that the reduction of tax immunities always accompanied the complete privatization of the PCAs. Pet. at 12-16; U.S. Brief (On Petition for Writ of Certiorari), No. 95-1918, at 2-4. In light of this Court's observations last time that "[t]he PCA's'

business is making commercial loans," and that PCAs' "interests are not coterminous with those of the Government any more than most commercial interests," 520 U.S. at 831, the state court ought to have explained why such factors should be disregarded in deciding the scope of intergovernmental tax immunity.

Perhaps most startling of all, however, is the apparent misappreciation the Arkansas Supreme Court showed toward the statutory analysis this Court utilized in the prior case. That analysis would, if applied to the tax immunity question, strongly militate to the contrary result to that reached below. In the prior case, this Court decided that the PCAs, "[d]espite their formal and undoubted designation as instrumentalities of the United States," did not "have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-32. That sufficed for the Court to "conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* The course of the Court's analysis in this regard included explicit reference to tax immunities as well:

> The tax immunity a PCA has under §2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all the rights and privileges of the National Government.

520 U.S. at 829.

Yet, in spite of the relevance of this analysis for applying to the tax immunity question principles similar to those governing jurisdiction under the Tax Injunction Act,

the Arkansas Supreme Court offered absolutely no explanation why this Court's statutory analysis would not apply to the immunity question also. As the most recent and direct statement (albeit dicta) touching on tax immunity of instrumentalities, closer attention was surely due to the *Farm Credit* decision.[3]

Nor does the state court's reliance on *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Department of Employment v. United States*, 385 U.S. 355 (1966) adequately respond to the Court's reasoning in *Farm Credit*. That is so, because *M'Culloch* involved bank legislation that made no mention of state tax immunity one way or the other; and *Department of Employment* held only that certain Internal Revenue Code provisions that exempted "federal instrumentalities" from state unemployment taxes applied to the National Red Cross.[4] Thus, neither case remotely

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[3] The Arkansas Supreme Court mentioned this Court's *Farm Credit* decision only once, in footnote 1, where it was referenced as part of the history of the litigation and as having decided the jurisdictional question. There was no further discussion of *Farm Credit*'s having any relevance. The Arkansas Supreme Court did cite *Farm Credit Services of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999), a case where a state tax court declined to extend this Court's statutory analysis in *Farm Credit* to determining the tax immunity of a Farm Credit System entity (not a PCA), primarily on the gounds that it thought doing so would require overruling *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). 705 N.E.2d at 1093. But that is not so, as noted below; in *M'Culloch* there was no immunity statute.

[4] The fact that *Department of Employment* applied a statutory immunity which Congress provided for certain "instrumentalities of the United States" is easily overlooked. The discussion of the statutes is consigned to the last paragraph of the opinion, which examines the effect of a 1960 amendment to those statutes. The Court concluded that service performed for certain "instrumentalities of the United States" was intended to be exempt

explains why Congress's explicit enumeration of tax immunities at 12 U.S.C. 2077 should not be deemed exclusive.[5]

In no way can the Arkansas Supreme Court be said to have advanced the analysis of tax immunity past the point of the Eighth Circuit panel majority in the prior case. That clarification needs to be supplied by this Court just as much now as in 1997, when certiorari was granted over the same

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from state as well as federal employment taxes; in accordance with this reading of the statutes the bulk of the opinion focuses on whether the Red Cross was such an "instrumentality" for purposes of applying the statutory exemption.

[5] Likewise, the Arkansas Supreme Court's citation to two Eighth Circuit cases fails to provide an explanation. Despite broad dicta, both *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist #1*, 657 F.2d 183 (8th Cir. 1981) and *United States v. City of Adair*,539 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), *aff'd*, 455 U.S. 995 (1982) involved immunity claims raised by entities on which Congress had expressly conferred broad grants of immunity (i.e., the Federal Reserve System and the Commodity Credit Corporation respectively), and the court considered the scope of an express statutory exception that allowed imposition of real property taxes. The appeals court decided in both instances that a special assessment against the property did not come within the real property tax exception, and therefore was barred. Thus, neither case required judicial extension of immunities beyond what the statute provided. To be sure, *Federal Reserve Bank* also engages in a separate inquiry whether the institution enjoyed an extra-statutory immunity as a "federal instrumentality," but the discussion of factors there (*e.g.*, performance of governmental functions such as creating currency) would not permit such an analysis to apply to PCAs after this Court's holding that PCA interests are "not coterminous with those of the Government any more than most commercial interests." 520 U.S. at 831.

immunity issue between the same parties. This time, the question is fully ripe for disposition by this Court.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted and the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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January 12, 2000

Supreme Court, U.S.
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JAN 14 2000
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(4)

No. 99-993

In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

SUPPLEMENT TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On January 13, 2000, the Arkansas Supreme Court issued an opinion with respect to the Arkansas Department of Finance & Administration's writ of certiorari filed on December 8, 1999. A copy of the Arkansas Supreme Court opinion is attached as Appendix A. The Arkansas Supreme Court determined that the chancery court lacked subject-matter jurisdiction to issue a writ of mandamus in this matter, and dissolved the writ of mandamus entered on November 24, 1999, and reconfirmed on December 8, 1999.

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. 99-1432

DICK BARCLAY, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION,

PETITIONER,

VS.

FARM CREDIT SERVICES, ET AL.,

RESPONDENTS,[1]

Opinion Delivered January 13, 2000

PETITION FOR WRIT OF CERTIORARI

WRIT OF MANDAMUS DISSOLVED

ROBERT L. BROWN, Associate Justice

The matter before this court is a petition for writ of certiorari filed by Dick Barclay, Director, Arkansas Department of Finance and Administration (DFA). The respondents are Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Associations (the PCAs). The issue raised involves the propriety of a writ of mandamus issued by the chancery court to restrain counsel for DFA from representing the State of Arkansas before the United States Supreme Court. We

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[1] The certiorari petition filed in this court refers to "Farm Credit Services," but the mandamus petition in chancery court and the case pending before the United States Supreme Court refer to "Farm Credit Services of Central Arkansas." We treat them as the same party.

dissolve the writ of mandamus due to lack of jurisdiction in the chancery court to issue the same.

On July 1, 1999, this court affirmed the summary judgment entered by the Pulaski County Chancery Court in favor of the PCAs because the PCAs were entitled to immunity from the state sales tax and income tax due to their status as "federal instrumentalities." *See State v. Farm Credit Services of Central Arkansas*, 338 Ark. 322, 994 S.W.2d 453 (1999). Throughout that litigation, the State was represented by Martha Hunt, legal counsel for DFA. On July 16, 1999, the State, which continued to be represented by Martha Hunt, moved this court to stay its mandate pending the resolution of its petition for writ of certiorari in the United States Supreme Court. This court stayed its mandate on September 9, 1999, over the objection of the PCAs.

On November 23, 1999, the PCAs filed a petition for writ of mandamus. In that petition, they prayed that the Pulaski County Chancery Court order DFA to refrain from acting in violation of Ark. Code Ann. § 25-16-703(a) (Repl. 1996). Section 25-16-703(a) reads that the Attorney General shall represent the State of Arkansas before the United States Supreme Court. The PCAs prayed that the DFA's legal counsel be stopped from filing the petition for writ of certiorari in that court or, if it already had been filed, be directed to withdraw it. On November 24, 1999, the chancery court orally granted the PCAs' petition for mandamus. The matter was then transferred to another division of the chancery court due to the recusal of the first chancellor. A motion for reconsideration was filed by DFA on December 3, 1999. Attached to the motion was correspondence from the Attorney General in which he

declined to act as counsel and a letter from Governor Huckabee appointing Martha Hunt as counsel. On December 8, 1999, the new chancellor denied DFA's motion for reconsideration and issued the writ of mandamus.

Also, on December 8, 1999, DFA filed its petition for certiorari in this court as well as a motion for expedited consideration and an application for temporary relief. In the application for temporary relief, DFA requested that this court stay the mandamus order so that DFA's legal counsel could proceed with the petition before the United States Supreme Court. The deadline for docketing that petition was December 13, 1999. By *per curiam* order handed down on December 10, 1999, we temporarily stayed the Chancery court's writ of mandamus in order to permit the certiorari petition to be docketed in the United States Supreme Court, and we ordered the parties to brief (1) the merits of DFA's petition in this court, and (2) the basis for the chancery court's jurisdiction to issue a writ of mandamus. On December 13, 1999, DFA's petition for writ of certiorari was docketed in the United States Supreme Court.

We turn first to the matter of the chancery court's jurisdiction to issue a writ of mandamus in this case to prevent DFA's counsel from representing the State. This court is obligated to raise issues of subject-matter jurisdiction on its own, and we do so in this instance. *See, e.g., Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

When this court asked for briefs on the question of the chancery court's jurisdiction, the parties briefed the issue of whether the chancery court had in fact issued a

writ of mandamus, or whether it, in reality, had issued an injunction to prevent a public official from committing an *ultra vires* act. *See Villines v. Lee*, 321 Ark. 405, 902 S.W.2d 233 (1995). We do not address that issue, because we conclude that the chancery court had no jurisdiction to take the action it did pertaining to *State v. Farm Credit Services of Central Arkansas, supra*, on December 8, 1999.

It is axiomatic that this court takes jurisdiction of a matter once the record on appeal is filed with the Clerk of the Supreme Court. *See, e.g., Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998); *In re Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992). This court loses jurisdiction to the trial court once the mandate is issued from this court to the trial court. *See First Pyramid Life Ins. Co. of Am. v. Stoltz*, 312 Ark. 516, 849 S.W.2d 525 (1993); *Brimson v. Brimson*, 228 Ark. 562, 309 S.W.2d 29 (1958). A mandate is the official notice of the action taken by the appellate court. 5 *Am. Jur. 2d, Appellate Review* § 777 (1995). The mandate is directed to the trial court, and it instructs that court to recognize, obey, and execute the appellate court's decision. *Id.* In the instant case, the mandate had been stayed by this court which had the effect of preventing reinvestment of jurisdiction in the chancery court. Accordingly, the chancery court had no jurisdiction to act in *State v. Farm Credit Services of Central Arkansas, supra.*

The remaining question then is whether the PCAs could file a new mandamus action subsequent to the mandate's stay to prevent counsel from representing the State in its petition for certiorari before the United States Supreme Court in *State v. Farm Credit Services of Central Arkansas, supra.* Stated differently, was the new mandamus action truly a separate case from the primary

litigation, or was it a procedural maneuver to prevent the certiorari petition from being heard by the United States Supreme Court?

We conclude that the mandamus action and resulting writ were so intertwined with the primary litigation as to be part and parcel of it. The stated prayer for relief in the mandamus petition was to prevent DFA's counsel from representing the State in the case before the United States Supreme Court. Indeed, at the time DFA petitioned this court for a writ of certiorari on December 8, 1999, the Attorney General had already declined the invitation to represent the State and Governor Huckabee had appointed Martha Hunt as counsel to represent the State before the United States Supreme Court, under the authority of Ark. Code Ann. § 25-16-702(c) (Repl. 1996). Thus, the effect of the chancery court's writ of mandamus was to thwart the State's certiorari petition from being docketed in the Supreme Court in *State v. Farm Credit Services of Central Arkansas, supra.*

Moreover, the appropriate avenue for relief to resolve the legal counsel issue would have been a petition filed before this court at the time the mandate was stayed. The PCAs were aware that the mandate was stayed on September 9, 1999, and would continue to be stayed pending resolution of the certiorari petition before the United States Supreme Court. Yet, the PCAs failed to petition this court for relief under § 25-16-703(a), when it was clear that this court retained jurisdiction over the matter and that the chancery court had no authority to act. Instead, the PCAs waited to file the mandamus petition until almost three months after the mandate was stayed. We cannot countenance a mandamus action brought

under these circumstances to derail appellate review of a certiorari petition filed in the United States Supreme Court.

We hold that the chancery court lacked subject-matter jurisdiction to issue the writ of mandamus in this matter.

Writ dissolved.

No. 99-993

In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

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SECOND SUPPLEMENT TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On January 25, 2000, the Supreme Court of Missouri issued its opinion in *Production Credit Association of Southeastern Missouri, et al. v. Missouri Director of Revenue.* (A copy of the Missouri Supreme Court opinion is attached as Appendix A). The decision holds that Production Credit Association and the National Bank for Cooperatives are exempt from Missouri corporate income tax.

Respectfully submitted,

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APPENDIX A

Supreme Court of Missouri

en banc

PRODUCTION CREDIT ASSOCIATION OF SOUTHEASTERN MISSOURI, et al.,	)	
Appellants,	)	
v.	)	No. SC81407
DIRECTOR OF REVENUE,	)	
Respondent.	)	
CoBANK, ACB, as Successor to The National Bank for Cooperatives,	)	
Appellant,	)	No. SC81727
v.	)	
DIRECTOR OF REVENUE, State of Missouri,	)	
Respondent.	)	

PETITIONS FOR REVIEW OF DECISIONS OF THE ADMINISTRATIVE HEARING COMMISSION
Honorable Willard C. Reine, Commissioner

This is a consolidated case in which several member institutions of the Farm Credit System seek review of the decisions of the Administrative Hearing Commission (AHC) upholding the Director of Revenue's (Director) assessment of corporate income tax. Appellants claim that their status as federal instrumentalities exempts

them from corporate income tax unless Congress expressly consents to the tax, and that Congress has not given that consent. Because appellants challenge the constitutional validity of section 143.071, RSMo 1994, the statute imposing the tax, this Court has exclusive jurisdiction. Mo. Const. art. V, sec. 3. The decisions of the AHC are reversed, and the cases are remanded.

Appellants in both cases – Production Credit Association of Southeast Missouri, Farm Credit Services of Western Missouri, Farm Credit Services of Eastern Missouri, and CoBank, ACB (successor in interest to National Bank for Cooperatives) – are part of the Farm Credit System created by Congress and chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971. 12 U.S.C. sec. 2001, *et seq*. The appellants are farmer owned, agricultural, cooperative organizations whose only business is to assist farmers in obtaining adequate and reliable credit at the lowest possible cost. They have been designated as "federally chartered instrumentalities of the United States." 12 U.S.C. sections 2071, 2141.

Appellants filed Missouri corporate income tax returns for the years 1991 through 1994 and paid the taxes shown on those returns. Thereafter, they filed amended returns requesting an exemption from all state taxes and refunds of the taxes erroneously paid. The Director then issued a "final decision" refusing the requests. On appeal, the AHC denied relief because it had no jurisdiction to address constitutional claims, *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75-76 (Mo. banc 1982), and, in particular, the validity of the corporate income tax as applied to the appellants. On

appeal to this Court, the two cases have been consolidated.

According to the rationale first expressed in *McCulloch v. Maryland*, 17 U.S. 316, 436-37 (4 Wheat.) (1819), the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation. *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 605 (1975); *First Agric. Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 340 (1968); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966); *United States v. Allegheny County*, 322 U.S. 174, 177 (1944). The Supreme Court has explained, however, that Congress can waive this immunity, but only if it expressly consents to state taxation. *Allegheny County*, 322 U.S. at 177. *See also Ken-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954) ("this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."). The Director does not dispute that appellants are federal instrumentalities or that Congress must give express authorization to state taxation. Instead, he argues that Congress' consent is clear when the current version of the Farm Credit Act, which is silent on the issue, is compared with the previous version, Farm Credit Act of 1971, Pub. L. No. 92-181, sections 2.17, 3.13, 85 stat. 583, 602, 608 (1971), which, until amended in 1985, expressly exempted member institutions from state income tax. As the Director explains, by deleting the exemption from state income tax, Congress necessarily intended to consent to the imposition of state income tax.

The Director's argument is unpersuasive. Congressional consent, under the Director's theory, is not express, but is merely implied, and the absence of express consent

is sufficient under the Supreme Court precedents to rebut the Director's claim. Furthermore, because the current version of the statute is silent on the matter, Congress' position is unclear, at best. Under these circumstances, Congress cannot be said to have expressly consented to state income tax.

Accordingly, this Court holds, as have the other courts that have addressed the issue of state taxation of member institutions of the Farm Credit System, that appellants are exempt from state income taxation. *See Farm Credit Serv. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997); *State v. Farm Credit Serv. of Cent. Ark.*, 994 S.W.2d 453, 456 (Ark. 1999), *petition for cert. filed*, 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); *Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n v. State*, 98 CA 1995, 1999 WL 1000995 (La. Ct. App. Nov. 5, 1999).

Having determined that the appellants are exempt from state income taxes, they are entitled to refunds on the taxes paid. The decisions of the AHC upholding the imposition of state income taxes are reversed, and the cases are remanded.

Stephen N. Limbaugh, Jr., Judge

All concur.

Supreme Court, U.S
FILED
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No. 99-993

In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

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THIRD SUPPLEMENT TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On February 1, 2000, the New Mexico Court of Appeals issued an opinion in *Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department of the State of New Mexico* (A copy of the New Mexico Court of Appeals opinion is attached as Appendix A). The opinion holds that a Production Credit Association is subject to New Mexico corporate income and franchise taxes.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Opinion Number _____

Filing Date: February 1, 2000

Docket No. 20,078

PRODUCTION CREDIT ASSOCIATION
OF EASTERN NEW MEXICO.

Appellant,

vs.

TAXATION AND REVENUE
DEPARTMENT OF THE STATE OF NEW
MEXICO.

Appellee.

APPEAL FROM THE NEW MEXICO
TAXATION AND REVENUE
DEPARTMENT Gerald B. Richardson,
Hearing Officer

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OPINION

PICKARD, Chief Judge.

Production Credit Association of Eastern New Mexico (PCA) filed a claim for refund of New Mexico corporate income and franchise taxes for the 1992-1996 tax years with the New Mexico Taxation and Revenue Department (Department). PCA claimed it was entitled to a refund because (1) Congress declared production credit associations like PCA to be federal instrumentalities, (2) federal instrumentalities are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives their immunity, and (3) Congress did not expressly waive PCA's immunity for the tax years at issue. The Department's internal hearing officer denied PCA's claim on the grounds that (1) Congress expressly waived the tax immunity enjoyed by privately owned production credit associations in the Farm Credit Act of 1933 and (2) Congress did not intend to confer upon these associations an implied immunity from state taxation by passing the farm Credit Amendments Act of 1985, which repealed the express tax immunity waiver that had been in place since Congress passed the farm Credit Act of 1933. We agree with the hearing officer and affirm his decision for the reasons stated below.

BACKGROUND AND PROCEDURAL HISTORY

In 1916, Congress passed the Federal Farm Loan Act (1916 Act). *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. 360, 362-64, 370-72 (1916). The 1916 Act established the Farm Credit System (System). *See id.* The System was created for the purpose of providing secured credit to farmers and ranchers at reasonable cost. *See* S. Rep. No. 144, at 2-3 (1916). The System, which then consisted of twelve regional land banks, could make loans only to farmers and ranchers. *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. at 362-64, 370-72. The loans had to be secured by first mortgages on farm or ranch property. *See id.* Seven years later, Congress created federal intermediate cr4edit banks for the purpose of making farm and ranch loans that could be secured by something other than first mortgages on farm or ranch lands. *See* Pub. L. No. 67-503, § 202(a)(3), 42 Stat. 1454, 1455 (1923).

In 1933, Congress, in response to the Great Depression, passed the Farm Credit Act of 1933 (1933 Act). *See* Pub. L. No. 73-75, § 20, 48 Stat. 257, 259. The 1933 Act established production credit associations (credit associations) like PCA for the purpose of providing short- and intermediate-term loans to farmers and ranchers. *See* S. Rep. No. 124, at 2 (1933). The United States initially capitalized and owned all the stock in the credit associations. *See id.* Pursuant to statute, the credit associations were exempt from state taxation while the federal government owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. However, pursuant to the same statute, once the federal government's stock was retired, the 1933 Act expressly waived the credit associations' immunity from state income and franchise taxes. *See id.* Congress

hoped that the United States' ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2.

In order to fulfill its hope, Congress required farmers and ranchers to purchase stock in the credit association from which they were borrowing in an amount equal to 10% of the unpaid principal balance of their respective loans. As part of the loans sufficient proceeds were generally advanced to the borrowers to purchase the required stock. Congress's hope was realized in the 1960s, by which time the credit associations were owned entirely by the farmers and ranchers who had borrowed money from them. The federal government no longer had an ownership interest in any credit association, nor has it since.

The Farm Credit Administration, which is the federal body responsible for regulating and examining the entities within the System authorized the incorporation of PCA as a credit association in 1934. As an incorporated and federally chartered credit association, PCA is a statutorily declared federal instrumentality. *See* 12 U.S.C. § 2071(a), (b)(7), § 2077 (1994). PCA's corporate purpose, like that of all other credit associations, is to exercise the powers granted to it by Congress under the 1933 Act as it existed or as it has been amended. Among other things, PCA loans money for periods of ten years or less; does not lend to the general public, but lends only to qualified ranchers or farmers; is not a depository bank; and has no deposit insurance.

In 1971, Congress passed the Farm Credit act of 1971 (1971 Act). *See* Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). The 1971 Act made a number of significant changes to the 1933 Act, but retained the tax provisions contained within the 1933 Act. *See id.* The tax provisions in the 1971 Act provided in relevant part:

> Each production credit association and its obligations are instrumentalities of the United States. . . . *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority. . . . The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

Id. (emphasis added).

In 1985, Congress passed the Farm Credit Amendments Act of 1985 (1985 Act). *See* Pub. L. No. 99-205, § 205, 99 Stat. 1678 (1985). The 1985 Act, among other things, repealed the highlighted sentences in the taxation section of the 1971 Act quoted above. *See id.*, § 205(d)(16), 99 Stat. at 1705. As a result, the limited waiver of immunity from state taxation that had been expressly worded in both the 1933 Act and the 1971 Act was not explicitly mentioned in the 1985 Act.

PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995, and 1996.

PCA timely submitted claims for refund of all New Mexico income taxes paid for tax years 1992-1996 in the total amount of $343,782. PCA based its claims for refund upon its understanding that, as a federal instrumentality, it is immune from state taxation pursuant to the Supremacy Clause of the Constitution. After the Department denied its claims, PCA timely filed a protest. In this consolidated proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in NMSA 1978, § 7-1-68 (1996).

STANDARD OF REVIEW

The issue presented for our review is whether Congress intended to confer tax immunity upon privately owned production credit associations by passing the 1985 Act, which repealed the express tax immunity waiver contained in both the 1933 Act and the 1971 Act. The parties submitted this issue to the Department's internal hearing officer for consideration upon stipulated facts. Accordingly, we are presented with an issue of law, which we must review *de novo*. *See State v. Ogden*, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (ruling that issues of law are reviewed *de novo*); *State v. Romero*, 119 N.M. 195, 197, 889 P.2d 230, 232 (Ct. App. 1994) (ruling that interpretation of statute is an issue of law). In conducting our review, we will not defer to the hearing officer's decision "because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

DISCUSSION

I. FEDERAL INSTRUMENTALITY

PCA claims it is an instrumentality of the federal government. We agree. The 1933 Act expressly stated that credit associations like PCA are federal instrumentalities. *See* Pub. L. No. 73-75; § 63, 48 Stat. at 267. Although Congress significantly altered the 1933 Act when it passed the 1971 Act, Congress nevertheless maintained the classification of credit associations as instrumentalities of the federal government in the 1971 Act. *See* 12 U.S.C. § 2071(a) ("Each production credit association shall continue as a Federally chartered instrumentality of the United States."); 12 U.S.C. § 2077 ("Each production credit association and its obligations are instrumentalities of the United States. . . . "). These provisions were not disturbed when Congress passed the 1985 Act, and they remain in effect to this day. In view of the fact that PCA is a federal instrumentality, we next address the consequences that result from PCA's status.

II. IMMUNITY FROM STATE TAXATION

A. Inherent Immunity

PCA claims credit associations, as federal instrumentalities, are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives that immunity. The Department counters that PCA's focus on constitutional immunity is misplaced because

> Congress did not rely on *constitutional* immunity in the original or subsequent Farm Credit Acts

> or enact a waiver of constitutional immunity. Rather Congress enacted both an explicit *statutory* immunity from state (and federal) taxes and an express statutory exception to that immunity for PCAs no longer federally owned.

In light of its contention, the Department intimates that credit associations like PCA would be subject to state taxation – even though Congress has deemed them to be federal instrumentalities – if not for Congress expressly granting them immunity from state taxation. We disagree with the Department. The Supremacy Clause inherently bars state taxation of federal instrumentalities. *See McCulloch v. Maryland*, 17 U.S. 316, 435-36 (1819), unless taxation is "authorized by Congress," *See First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 340 (1968).

As PCA claims, the now time-honored rule set forth in *McCulloch* has been followed by an unbroken line of Supreme Curt decisions. *See, e.g., United States v. Tax Comm'n*, 421 U.S. 599, 605 (1975) (holding that state could not impose tax upon sales to military base); *Department of Employment v. United States*, 385 U.S. 355, 358-59 (1966) (holding that Red Cross as a federal instrumentality is immune from state taxation); *Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146, 149 (1961) (stating that "a federal instrumentality is not subject to the plenary power of the States to tax"); *United States v. County of Allegheny*, 322 U.S. 174, 176 (1944) ("[S]ince 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that . . . instrumentalities of the Federated Government are immune from taxation by [the States], this Court never has departed from that basic doctrine or wavered in its application."); *Osborn v. Bank of the United*

States, 22 U.S. 738, 865 (1824) (ruling that congressional silence as to immunity from state taxation of federal instrumentality did not change the fact that it was immune from state taxation); *see also Peisker v. Unemployment Comp. Comm'n*, 45 N.M. 307, 309, 115 P.2d 62, 63 (1941) (stating rule of *McCulloch*). In view of the fact that PCA is inherently immune from state taxation, we must next address whether Congress purposely waived its immunity and whether further legislation was intended to be a return to inherent immunity.

B. Congressional Waiver

The Department's internal hearing officer concluded, and PCA concedes, that Congress expressly waived the inherent tax immunity enjoyed by privately owned credit associations in both the 1933 Act and the 1971 Act. The hearing officer also concluded that Congress did not intend, by passing the 1985 Act, to confer upon these credit associations an implied immunity from state income and franchise taxes. In order to draw this conclusion, the hearing officer looked to the entire legislative history and congressional intent underlying the 1985 Act.

PCA contends the hearing officer erred by delving into legislative history and congressional intent because the 1985 Act expressly repealed the pre-existing waiver of tax immunity contained within the 1933 Act without qualification or equivocation. According to PCA, under the plain meaning rule, we must give effect to the 1985 Act's language and refrain from further interpretation because its language is clear and unambiguous. *See State*

v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (stating the plain meaning rule).

PCA correctly points out that neither an administrative agency nor an appellate court can resort to legislative history or the principles of statutory construction when the statute in question is clear and unambiguous. However, PCA is mistaken in its contention that a statute that is apparently clear and unambiguous on its face is always subject to the plain meaning rule. As our Supreme Court has stated:

> [C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate . . . differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While . . . one part of the statute may appear absolutely clear and certain to the point of mathematical precision, *lurking in another part of the enactment or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent – the purpose or object – underlying the statute. See Perea [v. Baca]*, 94 N.M. [624,] 627, 614 P.2d [541,] 544 [(1980)] (courts are permitted to interpret by looking to legislative intent if there is *any doubt* as to the meaning of the words)

> (emphasis added); *State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (statute construed based on perceived legislative object and purpose, rather than on literal language). . . .

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (emphasis added).

As we explain below, both the history and background of the 1985 Act, and the apparent conflict between the 1985 Act's wording and the overall legislative intent expressly set out in the 1933 and 1971 acts, give rise to genuine uncertainty as to what Congress was trying to accomplish when it passed the 1985 Act. Consequently, we must search for and effectuate the legislative intent underlying the 1985 Act.

1. 1933 Act and 1971 Act

We first consider the legislative acts that preceded the 1985 Act. In the 1933 Act, Congress expressly stated that it intended for credit associations to lose their immunity from state taxation when the federal government no longer owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. In the 1971 Act, Congress continued to evince that intention. *See* Pub. L. No. 92-181, § 2.17, 85 Stat. at 602. In particular, Congress continued to expressly limit the tax immunity enjoyed by credit associations by stating

> [production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority. . . . *The exemption provided*

> *in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

See id. (emphasis added). In view of the express language contained in both the 1933 Act and the 1971 Act, we hold that Congress intended to subject privately owned credit associations to state income and franchise taxes prior to passing the 1985 Act.

2. 1985 Act

In the 1985 Act, Congress repealed the two sentences in the taxation section of the 1971 Act that expressly exempted credit associations from state taxation until the federal government no longer held an ownership interest in them. *See* Pub. L. No. 99-205, § 205(d)(16), 99 Stat. at 1705. As a consequence, the express waiver that had appeared in both the 1933 Act and the 1971 Act no longer appeared in the 1985 Act. According to the Department that result leaves us to consider (1) whether the deletion was intended simply to omit unnecessary language, having no substantive effect, since the waiver exception had completely swallowed the qualified exemption or (2) whether Congress intended a complete about-face on the issue of state taxation of credit associations. As we discuss below, we believe Congress simply intended to omit unnecessary language.

a) Surplus Language

As we stated above, Congress intended to subject privately owned credit associations to state income and

franchise taxes under both the 1933 Act and the 1971 Act. Indeed, Congress hoped that the federal government's ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2. Congress's hope was realized in 1968, by which time every credit association was, in fact, privately owned by the farmers and ranchers who had borrowed money from them. It would therefore have been useless, mere surplusage, for Congress to include an express waiver in the 1985 Act. By that time, every court that had had the occasion to address the taxability of privately owned credit associations honored Congress's intent and held in the tax collector's favor. *See, e.g., Woodland Prod. Credit Ass'n v. Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964) ("It is difficult . . . to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."); *Montana Livestock Prod. Credit Ass'n v. State*, 393 P.2d 50, 53 (Mont. 1964); *Columbus Prod. Credit Ass'n v. Bowers*, 180 N.E.2d 1, 2 (Ohio 1962); *Baker Prod. Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984, 985 (Or. 1966) (en banc).

b) Technical Changes

In view of the fact that by 1985, Congress had evinced its intention to subject privately owned credit associations to state taxation for well over 50 years and that the courts had uniformly supported Congress's power to do so, it would have been a major substantive change in legislative direction to suspend state taxation

of such associations. As the Department argues, if Congress intended to make a major substantive change in the way credit associations were taxed by passing the 1985 Act, "one would expect that there would be some mention of the change in the legislative history." And yet there is none. To the contrary, the House Report commentary on Section 205 of the 1985 Act states:

> Section 205 contains numerous *technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration.* This section would amend the appropriate provision of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R. Rep. No. 425, at 28 (1985).

Thus, neither the 1985 Act nor its written legislative history indicates any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations. We agree with the Department that "[i]t is extraordinarily unlikely that Congress would have intended such a marked change in the tax status of PCAs without a single mention of such change in any of the legislative history."

c) Return to Inherent Immunity

PCA's retort to this legislative history and congressional intent analysis is that "the Constitution provides immunity unless waived: and it is clear that the immunity was not waived for the period of PCA's claim for refund." PCA intimates that in light of *McCulloch*, Congress did not and could not legislate out of existence the credit associations' inherent immunity from state taxation under the Supremacy Clause without some current express language doing so. We disagree.

In *McCulloch*, the Supreme Court determined that states lack the power to tax federal instrumentalities due to the Supremacy Clause. *See McCulloch*, 17 U.S. at 435-36. Thus, when Congress is completely silent on state taxation of a federal instrumentality, the Supremacy Clause would bar state taxation. *See Osborn*, 22 U.S. at 865. However, when Congress expresses its intention to subject a federal instrumentality to state taxation, it is obvious that the Supremacy Clause would permit taxation. *See First Agric. Nat'l Bank*, 392 U.S. at 340 (ruling that national banks, as federal instrumentalities, are only subject to state taxation to the extent authorized by Congress).

In the case at bar, Congress expressly waived the state tax immunity of privately owned credit associations since credit associations were first created by the 1933 Act. Although the language waiving the exemption from state taxation was dropped in the 1985 Act, our analysis of the 1985 Act's entire legislative history, both that in the Congressional Record and that shown by the historical background of the legislation, leads us to the conclusion

that Congress did not intend to confer tax immunity upon privately owned credit associations in the 1985 Act. We therefore hold that PCA is not immune from the imposition of corporate income tax under the Supremacy Clause of the United States Constitution.

In crafting this holding, we acknowledge that the other courts that have considered the issue now before us for appellate review have ruled that, under the 1985 Act, all credit associations are immune from state taxation. *See, e.g., Arkansas v. Farm Credit Servs.*, 994 S.W.2d 453 (Ark. 1999); *Farm Credit Servs. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999). These courts, without exception, have based their decisions on the well-settled rule that federal instrumentalities retain their inherent immunity from the state taxation in the face of Congressional silence. *See Arkansas*, 994 S.W.2d at 455 ("Our federal government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity."); *Farm Credit Servs. of Mid-America*, 705 N.E.2d at 1092 ("The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in *McCulloch*. . . . ") (footnote omitted). Due to the fact that the 1985 Act fails to expressly waive the tax immunity enjoyed by credit associations, these courts have concluded that such associations are not subject to state taxation. *See Arkansas*, 994 S.W.2d at 456 ("The current version of § 2077, with its silence on the issue [of state taxation], compels a holding of immunity. . . . "): *Farm Credit Servs. Of Mid-America*, 705 N.E.2d at 1092 ("Because Congress has not waived . . . immunity from

state taxation, under the Supremacy Clause, Indiana is without power to collect the [tax] from Mid-America.").

In our view, these court's narrow and exclusive focus on the 1985 Act's language produces a logical but incorrect result. We agree with the courts that if we looked at the law only at the time when PCA was taxed. PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation. Our review of the issue presented on appeal, however, is not confined to a cursory or wooden analysis of the 1985 Act. *See Gallegos*, 117 N.M. at 353, 871 P.2d at 1359 (ruling that it is our responsibility to search for and effectuate the legislative intent underlying the statute in question). After examining the 1985 Act's clear and extensive legislative history, we believe, for the reasons stated above, that Congress has unequivocally evinced its unwavering intention to subject privately owned credit associations to state income taxation. In particular, we are most persuaded by the dissent in *Farm Credit Services v. Arkansas*, 76 F.3d 961, 967 (8th Cir. 1996) (Loken, J., dissenting), *rev'd on other grounds*, 520 U.S. 821 (1997). We must give deference to that intention. *See State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent and not the statute's literal language, that we must vindicate).

CONCLUSION

For the reasons stated, we affirm.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Chief Judge

WE CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN, Judge